

Constructing Professionalism: The Professional Project of the Israeli Judiciary

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"The judges are . . . the mouth that pronounces the words of the law" *Baron Charles de Secondat Montesquieu*¹

"The Judge . . . is a mouth to the soul . . . of the nation." *Aharon Barak, Chief Justice of the Israeli Supreme Court*²

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¹ BARON CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF THE LAWS* 163 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

² Aharon Barak, *The Role of the Supreme Court in a Democratic Society*, 21 TEL-AVIV U. L. REV. 13, 15 (1997).

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INTRODUCTION

In November 1996, the chairman of the Israeli Bar, Dror Hoter-Ishai, made an unprecedented and vehement attack on the Israeli Supreme Court and on the Israeli judicial system in general. The condition of the justice system, he asserted, was outrageous and intolerable. Judges neglected their duties and engaged in “management of the state” while the judicial system was collapsing under an enormous caseload. The Supreme Court was functioning as a super-legislator or super-managing director of the state instead of “minding its own business.” He argued that neither law nor justice could be found in the High Court of Justice, and thus he called for its abolition.³

³ Shahar Ilan & Ben-Zion Tsitrin, *The Chairman of the Bar Association: “What is*

This unusual outburst was the culmination of a long campaign waged by the chairman of the Israeli Bar against the judicial system since the early 1990s. During this campaign, the chairman accused the judges of partiality and corruption, among other things,⁴ and chastised the Chief Justice of the Supreme Court for corrupting the judicial system by delaying important decisions while making millions publishing overpriced academic books and teaching in academic institutions.⁵

What can account for this peculiar phenomenon—the Bar leading an attack on the judiciary? What induced this profound rupture between the judiciary and the Bar?

This article attempts to provide an answer to these puzzles. It argues that the rift within the Israeli legal profession is a reaction to a “professional project” launched by the Israeli judiciary during the 1980s. The judiciary endeavored to cut its close ties with the Bar and construct in their stead an independent judicial profession. As a result, the Israeli judiciary distanced itself from its roots as a common law court based on the English model. In some ways it approached the American paradigm, in which high court judges often see themselves as policy makers. Yet in other ways the Israeli judiciary strove to shape a new model that combines characteristics of both common law and civil law judiciaries, enjoying, so to speak, the best of all worlds. This article is intended as an exploratory essay on the origins and meaning of such a phenomenon.

Happening in the High Court of Justice is Outrageous; Neither Justice Nor Law Can Be Found There, HA'ARETZ, Nov. 27, 1996, at A1, A12 [hereinafter Ilan & Tsitritin, “*What is Happening in the High Court of Justice is Outrageous*”]. See also Shahar Ilan, *Hoter-Ishai Calls to Abolish the High Court of Justice and Replace Ben-Yair*, HA'ARETZ, Nov. 27, 1996, at A8 [hereinafter Ilan, *Hoter-Ishai Calls to Abolish the High Court*]. The Israeli Supreme Court functions both as an appellate court and as the High Court of Justice. In its capacity as the High Court of Justice, the Supreme Court exercises an equity jurisdiction, ruling as:

a court of first instance, primarily in matters regarding the legality of decisions of State authorities: Government decisions, those of local authorities and other bodies and persons performing public functions under the law. It rules on matters in which it considers it necessary to grant relief in the interests of justice, and which are not within the jurisdiction of another court or tribunal.

The State of Israel, The Judicial Authority, at <http://www.court.gov.il/mishpat/html/en/system/index.html> (last visited May 13, 2000).

⁴ See Dalia Shkhory & Gidon Alon, *The Bar's Council Surprisingly Postponed the Date for Electing a New Chairman Instead of Hoter Ishtai*, HA'ARETZ, Nov. 2, 1992, at A11. See also SHIMON SHETREET, *JUSTICE IN ISRAEL: A STUDY OF THE ISRAELI JUDICIARY* 303 (1994).

⁵ Shahar Ilan & Gidon Alon, *Hoter-Ishai: “Barak Delayed Decisions and Caused People to Commit Suicide,”* HA'ARETZ, Nov. 28, 1996, at A1 [hereinafter Ilan & Alon, “*Barak Delayed Decisions*”]. See also Ilan, *Hoter Ishai Calls to Abolish the High Court*, *supra* note 3, at A8.

The article is organized around the following socio-historical claim: In the first decades of its existence, the Israeli judiciary perceived itself as part of a unified⁶ and marginalized legal profession. It shared with the Bar common professional interests and a similar liberal and individualistic ideology, which stood in contrast to the prevalent collective ideology of the Israeli society. In concert with general cultural transformations occurring within Israeli society in the early 1970s, the judiciary, led by the Supreme Court, began to develop a professional identity distinct from that of the Bar. This tendency intensified in the early 1980s and culminated around the mid-1980s, when one can observe a large number of practices constructed to distinguish the professional identity and functions of the judiciary from those of the legal profession. This article traces and examines these practices and analyzes the reaction of the lawyers⁷ to them; I call this phenomenon the “professional project” of the judiciary.

The theoretical framework informing this article derives from the sociology of the professions.⁸ The analytical approach of the sociology of the professions has rarely been applied to judges, although there is a vast

⁶ Richard Abel described the legal profession in the common law world as follows: The category [the legal profession] is essentially unitary Although some lawyers perform their roles as house counsel, prosecutors, government employees, members of legal aid or public defender offices, law teachers, or judges . . . they both see themselves and are perceived as constituents of a single legal profession. They share the same formal qualification, and lawyers move fairly freely between the categories.

Richard L. Abel, *Lawyers in the Civil Law World*, in *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD* 1, at 4 (Richard L. Abel & Philip S.C. Lewis eds., 1988) [hereinafter Abel, *Lawyers in the Civil Law World*].

⁷ In this paper the term “lawyers” is used to denote only law practitioners and does not include judges or other holders of judicial office.

⁸ This article uses, in particular, Magali Larson’s notion of the “professional project.” See MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977). See *infra* notes 104-07 and accompanying text for the definition and a discussion of the notion of the “professional project.” This article also makes use of Andrew Abbott’s conceptual framework of the “system of professions.” See ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* (1988). Moreover, this article is informed by Richard Abel’s rich literature discussing the legal profession. See, e.g., RICHARD L. ABEL, *AMERICAN LAWYERS* (1989) [hereinafter ABEL, *AMERICAN LAWYERS*]; *LAWYERS: A CRITICAL READER* (Richard L. Abel ed., 1997); *LAWYERS IN SOCIETY: AN OVERVIEW* (Richard L. Abel & Philip S.C. Lewis eds., 1995); *LAWYERS IN SOCIETY: COMPARATIVE THEORIES* (Richard L. Abel & Philip S.C. Lewis eds., 1989); *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD* (Richard L. Abel & Philip S.C. Lewis eds., 1988); *LAWYERS IN SOCIETY: THE COMMON LAW WORLD* (Richard L. Abel & Philip S.C. Lewis eds., 1988); RICHARD L. ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* (1988) [hereinafter ABEL, *THE LEGAL PROFESSION*]; Richard L. Abel, *Comparative Sociology of Legal Professions: An Exploratory Essay*, 1 AM. B. FOUND. RES. J. 1 (1985); Richard L. Abel, *Taking Professionalism Seriously*, 1 ANN. SURV. AM. L. 41 (1989); Richard L. Abel, *Toward a Political Economy of Lawyers*, 5 WIS. L. REV. 1117 (1981).

literature dealing with the legal profession.⁹ The legal profession as a distinct field of study emerged in the early 1980s as a reaction both to the over-emphasis of legal scholarship on judges and adjudication,¹⁰ and to the partial neglect of lawyers by mainstream sociology.¹¹ The field of study has since accumulated a body of scholarly works dealing with lawyers and their work, ideology, and professional organization. Few attempts have been made, however, to apply this vast scholarship to the judiciary.¹² Scholars of the legal profession have treated the judiciary as either a marginal branch of the legal profession not worthy of special discussion,¹³ or as part of the state's bureaucracy, unsuitable for analysis with the tools of the sociology of the professions.¹⁴ This article seeks to remedy this

⁹ See sources cited *supra* note 8.

¹⁰ See Philip S.C. Lewis, *Introduction*, in *LAWYERS IN SOCIETY: THE COMMON LAW WORLD I*, at 1-2 (Richard L. Abel & Philip S.C. Lewis eds., 1988) [hereinafter, Lewis, *Introduction*] ("Lawyers, thus, are a significant element in legal systems, worth as much attention for what they do and how they should act as has been paid to judges and adjudication.").

¹¹ See *id.* at 5 (arguing that "[m]ainstream sociological theory did not generate much research on lawyers").

¹² One of the few attempts to apply the sociology of the professions to judges can be found in Alan Paterson, *Becoming a Judge*, in *THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS* 263 (Robert Dingwall & Philip Lewis eds., 1983). Paterson examines the judiciary in the United Kingdom and raises the question of whether it constitutes an occupational group to which the label "profession" can be attached. After examining different characteristics or traits of professionalism such as occupational autonomy, career pattern, control over the production of producers, ethics code, professional association, professional training, and self-perception, he concludes that the judiciary is an ambiguous entity—it has some of the traits of a profession but lacks others—and that the study of the process of becoming a judge is not so much one of professional socialization as a study of occupational recruitment. Nevertheless, he remarks that "the literature on professional socialisation [sic] is of more than passing relevance . . .". *Id.* at 265.

¹³ See, e.g., Abel, *Lawyers in the Civil Law World*, *supra* note 6, at 4 ("The category [of the legal profession] is essentially unitary. Its core—historically, numerically, and ideologically—is private practice Although some lawyers perform their roles as . . . law teachers, or judges, these categories are smaller and more peripheral . . .").

¹⁴ See, e.g., Paterson, *supra* note 12; Ivan Szelenyi & Bill Martin, *The Legal Profession and the Rise and Fall of the New Class*, in *LAWYERS IN SOCIETY: COMPARATIVE THEORIES* 256, 272 (Richard L. Abel & Philip S.C. Lewis eds., 1989) (arguing that it is problematic to apply the ideal type of professionalism to the judiciary which is part of the state's bureaucracy). But see Zvekic Ugljesa, *A False Dilemma: Between the Bureaucrat and the Professional—Role of Judges in Yugoslavia* (1982) (paper presented at the Tenth World Congress of Sociology, on file with author). Ugljesa argues that "proper professional ideology may not only coexist with bureaucratic ideology, but may be even supported or created by it." *Id.* at 3. Therefore, she concludes that the fact that the judiciary is a part of the state's bureaucracy does not prevent it from also being a profession. *Id.* at 20. For an elaborated and useful discussion of the "conflict between professions and bureaucracy," see LARSON, *supra* note 8, at 190-207.

I agree with Eliot Freidson, who claims that the attempt to provide a generic definition for a profession or professionalism is a futile project. See ELIOT FREIDSON, *PROFESSIONALISM REBORN: THEORY, PROPHECY, AND POLICY* (1994) [hereinafter FREIDSON,

oversight and to complete the circle by applying the sociology of the legal profession to the judiciary in the Israeli context.

Part I situates the study within its historical and sociological context, describing the professional project as it emerged from the differing responses of the Bar and the judiciary to the economic and cultural changes within Israeli society beginning in the early 1970s. Part II presents a theoretical framework for understanding the professionalization process and provides evidence for the claim that the Israeli judiciary did indeed undergo a professional project. Part III discusses the opposition of the Bar to the professional project. Part IV engages in a comparative law analysis, situating the professional project within a broader context. The article presents the two principal models of Western judiciaries—the common law and the civil law—and argues that the Israeli judiciary strove to shape a new model of judiciary that combines the best of both worlds.

I. THE ISRAELI LEGAL PROFESSION: HISTORICAL AND SOCIOLOGICAL BACKGROUNDS

A. *Mandatory Palestine (1920-1948)*

An account of the origins of the Israeli legal profession must begin with the British Mandate over Palestine in the years following World War I. The British, who succeeded the Ottoman Empire, built anew the legal system in Palestine, imitating the model used in their other colonies.¹⁵ Although the British did not purport to import the common law in full into Palestine, they did provide a blueprint for an “efficient and professional legal administration”¹⁶ and imbued the colonial legal system with the emblems of their respectable common law tradition. In other words, although the substance of the law in Mandate Palestine was, in the colonial

PROFESSIONALISM REBORN]. Such an attempt originated in the structural functionalist school that searched for formal traits that distinguish a “profession” from a mere occupation and “treat[ed] profession as if it were a generic rather than a changing historic concept.” *Id.* at 16. The purpose of this article is not to discover whether the judiciary is or is not a profession *per se*, but to understand social processes in the Israeli legal field. The sociology of the professions serves as a useful and illuminating theoretical framework, one of among many other perspectives that could have been used. For my purposes, I adopt the very loose definition of the professions suggested by Andrew Abbott in *The System of Professions* as “exclusive occupational groups applying somewhat abstract knowledge to particular cases.” ABBOTT, *supra* note 8, at 8. The fundamental strength of Abbott’s model is the open-ended definition of the professions and the emphasis he puts instead on the evolution of and interrelations among professions and on the ways occupational groups control knowledge and skills. *See id.*

¹⁵ *See, e.g.,* ELIEZER MALCHI, HISTORY OF THE LAW OF PALESTINE (1953).

¹⁶ *See* RONEN SHAMIR, THE COLONIES OF LAW: COLONIALISM, ZIONISM AND LAW IN EARLY MANDATE PALESTINE 118 (2000) [hereinafter SHAMIR, THE COLONIES].

eyes, *only* a revision and update of the existing Ottoman laws (as interpreted, of course, by British judges and legislators), the symbols and formal institutions introduced by the British colonial administration bestowed an aura of rationality, modernity, and professionalism on the Mandatory legal system.¹⁷

The British legal administration and institutions had an immense impact on the evolving legal profession in Palestine, its ideology, and its legal culture. Two central rationales can account for this impact: A cultural or ideological rationale and a structural one. On a cultural level, Jewish lawyers in Palestine, who saw themselves as part of the modern Western world, allied themselves with the British legal system as a way to ground their Western identity.¹⁸ Identification with the British legal administration, with its Orientalist¹⁹ undertones and its explicit contempt

¹⁷ I do not purport to argue that the substantive law of Mandate Palestine remained the same as it was in the times of the Ottoman rule. I am well aware of the fact that legal institutions and formal procedures have far-reaching impact on the substance of the law. Moreover, the interpretation of the Ottoman legal rules by Orientalist British judges, who had a very different mindset from their Turkish counterparts, inevitably affected the content of the rules in a very profound way. See, e.g., Assaf Likhovski, *In Our Image: Colonial Discourse and the Anglicization of the Law of Mandatory Palestine*, 29 ISR. L. REV. 291, 297 (1995) (demonstrating a process he calls the "anglicization of the law of Palestine," in which the Mandatory British judges' approach to the Ottoman law was influenced, to a large extent, by their perceptions of the "nature" of the natives in Palestine). My claim, however, is that the British colonial administration of Palestine perceived itself as retaining the legal "status quo" as required by the League of Nations' Mandate, while providing the indigenous primitive population of Palestine with a modern and enlightened legal administration system, thus fulfilling their colonial mission of elevating and educating the indigenous people. Cf. Sally Falk Moore, *Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running "Their Own" Native Courts*, 26 LAW & SOC'Y REV. 11 (1992) (demonstrating the impracticability of the British efforts to insert their model of courts into the complicated, little-understood African setting while retaining the substantive African law).

¹⁸ Cf. Neta Ziv, *Human Rights Law and Public Interest Lawyering: A Study on the Interdependence of Jurisprudence and the Legal Profession in Israel* (2000) (unpublished J.S.D. dissertation, Stanford Law School) (on file with author) [hereinafter Ziv, *Human Rights*].

¹⁹ Orientalism, as conceptualized by Edward Said, is a "style of thought based upon an ontological and epistemological distinction made between 'the Orient' and (most of the time) 'the Occident.'" EDWARD SAID, *ORIENTALISM* 2 (1979). The Orientalist discourse represents, or more accurately imagines, the Orient as fixed entity that is exotic, obscured, disorganized and irrational; and Oriental societies as primitive, static and despotic. The Occident self is portrayed as the opposite of the Orient. "European culture," argues Said, "gained in strength and identity by setting itself off against the Orient as a sort of surrogate and even underground self." *Id.* at 3. Thus, he concludes, Orientalism is "a Western style [of] dominating, restructuring, and having authority over the Orient." *Id.*

for the “primitive” Ottoman legal system, served the nationalist project of the Jewish lawyers to distinguish themselves from their Arab counterparts.²⁰

But the attempt of Jewish lawyers to link themselves to the West and to construct their identity as an “other” to the indigenous Arab population provides only a partial answer to the puzzle. A fuller explanation must look also to the professionalization of legal practice during the Mandate years and the ensuing institutional ties that emerged between the colonial justice administration and the Jewish lawyers. The British administration played an active role in this process. Beginning in the early 1920s, the colonial administration launched a comprehensive program of professionalization in law. In 1920, the colonial administration inaugurated a government law school under the auspice of Norman Bentwich, the senior legal advisor to the Mandatory government.²¹ Studies at the law school were conducted on two levels. There was a basic level, at which the classes were conducted in Hebrew or Arabic and covered areas of law such as Ottoman *Majela*, land law, commercial law, criminal law, and criminal and civil procedure.²² Graduates of the basic level were eligible for an examination and to be licensed as lawyers, but they were not entitled to a formal law degree.²³ Law degrees were granted only to those who continued to the second level, a three-year program, conducted in English,

²⁰ See SHAMIR, *THE COLONIES*, *supra* note 16, at 25. Shamir wrote that:
In law, the identification with the West was directly expressed in the dominant attitude towards the newly established colonial system of justice . . . English imported law and the legal ways of the British in general were perceived by most Jewish jurists in Palestine as the incarnation of a highly developed enlightened law.

Id. The British, on the other hand, were not willing to see the Jews as their equals but regarded them as a peculiar kind of “natives.” This is reflected in the following excerpt from a book written by an American reporter in 1929:

The English do not like the Jews as a subject population. In fact, they do not know what to make of them . . . the Jews must of course be classified as natives. But they do not seem like natives. They are acquainted with western culture . . . many of them speak the English language and are familiar with English ways. What is more, these Jews do not act like natives. They are not submissive, and obedient, and grateful On the contrary, they are independent and proud The Jews are trouble makers . . . and thus are regarded by the English . . . with the active dislike of a superior class for an inferior class which does not know and keep its place.

JOHN HAYNES HOLMES, *PALESTINE TO-DAY AND TO-MORROW: A GENTILE'S SURVEY OF ZIONISM* 152 (1929).

²¹ See SHAMIR, *THE COLONIES*, *supra* note 16, at 115.

²² *Id.*

²³ *Id.*

that covered areas of law such as jurisprudence, English tort law, contract law and international law:

In other words, the school's program was structured in a way that explicitly singled out the true full-fledged legal expert: only someone who was proficient in English, who had been familiarized with the notion of law as a theoretical body of knowledge, and who had actually mastered the essential principles of English law.²⁴

Two years later, in 1922, the government enacted the Advocates Ordinance regulating legal practice in Palestine.²⁵ The Ordinance clearly distinguished professionals from lay people, forbidding unlicensed people from practicing law, and set the formal requirements for obtaining such a license. These requirements included, among other things, two years of internship in the office of a licensed lawyer in Palestine and undertaking a qualifying examination.²⁶ Moreover, the Ordinance included additional requirements that are characteristics of a profession: An assertion of the duty of lawyers to act in the best interest of their clients and to assist the court in administering justice, restriction on vocational activities of lawyers to legal work only, and establishment of internal disciplinary tribunals.²⁷

The Advocates Ordinance and the government law school laid the foundations for the professionalization of the legal field in Mandatory Palestine. These efforts bore fruit and "the emerging Jewish legal profession of colonial Palestine identified with and adopted the . . . English law as a 'perfected' system of law."²⁸ Jewish lawyers adopted and incorporated into their institutions many of the structural attributes of the British legal system. The identification was not limited to the structural aspects of the British justice administration, but also included its spirit and system of beliefs.²⁹

Two central interconnected characteristics of British legal culture were its profound formalism and its professionalism. The British ideology of legal formalism was deeply embedded in free-market economic philosophy and emphasized the private role of lawyers. In this context, legal formalism should be understood as the belief in a close and

²⁴ *Id.*; see also Ronen Shamir, *Lex Moriandi: On the Death of an Israeli Law*, in *MULTICULTURALISM IN A DEMOCRATIC AND JEWISH STATE* 589, 619 (Menachem Mautner et al. eds., 1998) [hereinafter Shamir, *Lex Moriandi*].

²⁵ Advocates Ordinance of 1922, OFFICIAL GAZETTE OF THE GOVERNMENT OF PALESTINE No. 13, July 15, 1922, at 4.

²⁶ *Id.* §§ 2, 3, & 5.

²⁷ *Id.* §§ 14 & 15.

²⁸ SHAMIR, *THE COLONIES*, *supra* note 16, at 123.

²⁹ See, e.g., EDWIN SAMUEL, *BRITISH TRADITIONS IN THE ADMINISTRATION OF ISRAEL* 33 (1957).

autonomous system of rules in which “outcomes are dictated by demonstrative (rationally compelling) reasoning” and in which “every case has a right answer” that can be deduced from higher legal rules or principles.³⁰ This approach prioritizes the formal characteristics of the law, based on second order procedures and rules, and prefers it to considerations of content and substance.³¹ Legal formalism is rooted in political and economic philosophies that consider the stability and certainty of the law as an important tool for securing the functioning of the free market and the state’s bureaucracy.³² The role of lawyers in such a system includes mediating between private parties and legal institutions by using their professional knowledge to translate their clients’ claims into professional language. This legal ideology is, by its nature, highly individualistic. The lawyers’ duty is to pursue their clients’ interests and the collective good emerges structurally from the system. The Jewish-Palestinian lawyers identified with and absorbed these British concepts of legalism, formalism and professionalism.

It is not surprising, then, that almost no attempts were made to establish an alternative to the Mandatory legal system.³³ This phenomenon is salient to the background of the situation in other social realms, such as education, health-care, and the military, in which institutional infrastructures were laid down by the Jewish community of Palestine (the *Yishuv*) during the British Mandate as a preparatory step for the future State of Israel.³⁴ The “failure” of the *Yishuv* to set up an alternative to the British legal administration has received several interpretations. Elyakim Rubinstein, currently the Israeli Attorney General, believes that the main reason lies in the lack of agreement among the members of the *Yishuv* on

³⁰ Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1, 8 (1983).

³¹ MENACHEM MAUTNER, *THE DECLINE OF FORMALISM AND THE RISE OF VALUES IN ISRAELI LAW* 13-31 (1993) (providing a comprehensive review of the notion of legal formalism).

³² See Shamir, *Lex Moriandi*, *supra* note 24, at 590.

³³ Cf. Daniel Friedman, *Infusion of the Common Law into the Legal System of Israel*, 10 ISR. L. REV. 324, 325 (1975) (“At the end of the Ottoman rule the legal system in Israel was ripe for change. The British conquest was welcomed, at least by the Jewish population, and under the circumstances there was no objection to absorbing the legal system of the new conqueror.”). An important exception was the unsuccessful attempt of Jewish nationalist jurists to establish a non-religious system of Hebrew courts—*Mishpat Ha-Shalom Ha-Ivri* [“The Hebrew Law of the Peace”]—in British-ruled Palestine that would serve as an alternative to the British Mandatory legal system. For a discussion of this attempt and the reasons for its failure, see generally SHAMIR, *THE COLONIES*, *supra* note 16.

³⁴ See BARBARA J. SMITH, *THE ROOTS OF SEPARATISM IN PALESTINE: BRITISH ECONOMIC POLICY 1920-1929*, at 3 (1993) (“By the end of the 1930s the Zionists in Palestine had formed virtually a ‘state within a state’ with a military organization and political, social, economic, and financial institutions separate from those of the indigenous population as well as from the British Mandatory Administration.”).

the form and content of an independent legal system. Such an agreement, claims Rubinstein, was crucial for the establishment of an autonomous legal system while it was less important for the efficient functioning of other social institutions.³⁵ Ronen Shamir, on the other hand, argues that at least part of the responsibility for the failure should be attributed to the Jewish lawyers' community. Jewish lawyers, wedded to the English law both by ideology and by default,³⁶ refused to replace the Mandatory formal legal system, based on the rule of experts, with an unpredictable and informal communal legal system which would have denied them both the advantages and the benefits of professionalism.³⁷ Consequently, the lawyers were uncooperative and even hostile to the attempts to establish an alternative to the British legal system and thus such attempts were doomed to failure.³⁸ The leaders of the Jewish-Palestinian legal profession took the extra step and argued that "true" nationalism does not imply the establishment of an alternative to the Mandatory legal system, but rather requires the integration of Jewish professionals into Mandatory legal institutions as lawyers and judges.³⁹ Interestingly, Elyakim Rubinstein, himself a former lawyer and a judge, indirectly supports Shamir's argument by praising the "failure" of the *Yishuv* to construct an alternative legal system as having a positive effect on the evolving Israeli legal system, leading to the adoption of the British legal spirit and institutions.⁴⁰

³⁵ See ELYAKIM RUBINSTEIN, SHOFTEI ERETZ: LERESHITO VELIDMUTO SHEL BET-HAMISHPAT HAELYON BEISRAEL [JUDGES OF THE LAND: THE ORIGINS AND IMAGE OF THE ISRAELI SUPREME COURT] 19 (1980).

³⁶ By "default" Shamir implies the following:

Lawyers are trained to frame anticipated and concrete conflicts in pre-given forms, to master rules, and to litigate in appropriate forums. Thus, a majority among Jewish Palestinian lawyers were wedded to English law by default; not because of any clearly articulated ideological disposition, but simply because they opted for what seemed to be the more rational and cost-effective way to conduct legal business on behalf of clients.

SHAMIR, THE COLONIES, *supra* note 16, at 118-19.

³⁷ See Shamir, *Lex Moriandi*, *supra* note 24, at 617-27.

³⁸ Ronen Shamir emphasizes the important role the lawyers played in obstructing the attempts to construct an alternative informal legal system for the Jewish community in Palestine, based on nationalist premises. See SHAMIR, THE COLONIES, *supra* note 16, at 108-26.

³⁹ Bernard Joseph, one of the leaders of the legal profession, who later became the Israeli Minister of Justice, rejected the proposal to establish a Zionist alternative to the British legal system as "psychological residues of the Ghetto" and "a remnant of exilic life." "True nationalism . . . depended on strengthening the ties to the institutions of the Mandatory state . . . Jewish judges who would be appointed to the Mandatory courts, Jewish jurists who would shape the spirit the Mandatory law." SHAMIR, THE COLONIES, *supra* note 16, at 112 (quoting Bernard Joseph, *The Hebrew Settlement and the Government's Courts*, HA'ARETZ, Aug. 24, 1926, at 2).

⁴⁰ See RUBINSTEIN, *supra* note 35, at 19-20.

B. The State of Israel—The First Two Decades (1948-1970)

On May 14, 1948, the British Mandate over Palestine officially came to an end and on the same day the State of Israel declared its independence.⁴¹ In the absence of any foundations for an original Israeli legal system, the natural solution in Israel, as in most post-colonial states, was the adoption of the existing colonial legal rules and institutions. The Provisional Council of State issued as one of its first actions a proclamation announcing that the legal system was to remain the same as that existing on the eve of independence.⁴² Similarly, recognizing the impossibility of administering justice without functioning courts, the Provisional Council enacted Article 17 of the Law and Administration Ordinance,⁴³ establishing the continuity of the judicial system. The Ordinance proclaimed that until the enactment of new laws, the existing courts were to continue to function within the scope of the powers conferred upon them by law.⁴⁴

The courts, however, could not function without judges, and the British and Arab judges who filled the large majority of the Mandatory judicial offices did not continue to serve in the new Israeli judicial system.⁴⁵ Thus, a pressing demand for judges arose. This need was partly relieved by the several Palestinian Jews who served as judges in the Mandatory courts. Jewish judges, however, were few in number and many more judges were needed in order to fill the empty offices in the new judiciary.⁴⁶ Moreover, not all the judges who served in the Mandatory courts were asked to join the Israeli judiciary. Notably, Justice Gad Frumkin, the highest-ranked Jewish judge in the Mandatory legal system, was not asked to join the Israeli Supreme Court. Rubinstein accounts for the apparently odd omission by remarking that the Supreme Court was an

⁴¹ See ISRAELI MINISTRY OF FOREIGN AFFAIRS, DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL, available at <http://www.israel.org/mfa/home.asp> (last visited May 15, 2001).

⁴² The announcement, rationalized by the will to prevent the “legal chaos” that would ensue from the abolishment of the Mandatory laws without yet having original Israeli laws, stated that the law in force in Eretz-Israel (Palestine) on May 14, 1948, should remain in force, provided it was not in conflict with the Ordinance or any other law to be enacted by or on behalf of the Provisional Council of State and subject to any modifications resulting from the establishment of the state and its authorities. See SHETREET, *supra* note 4, at 62.

⁴³ Law and Administration Ordinance, 1948, 1 L.S.I. 7 (1948).

⁴⁴ *Id.* at § 17.

⁴⁵ RUBINSTEIN, *supra* note 35, at 56.

⁴⁶ Twenty-two Palestinian Jews served as judges in the Mandatory Magistrates and district courts. See REPORT OF THE MINISTER OF JUSTICE, PINHAS ROSEN, TO THE PARLIAMENT, D.K. 1176 (1951). The division of the Jewish Palestinian judges according to judicial instances on the eve of independence was as follows: One Supreme Court Justice, nine district court judges, and thirteen magistrate court judges. See RUBINSTEIN, *supra* note 35, at 25.

important symbol of sovereignty for the new State: The Justice Department and the Temporary Government found it inappropriate to appoint a Supreme Court Justice who represented the Mandatory regime.⁴⁷

These circumstances left the decision-makers with only one “natural” source of possible appointees to the various judicial offices—the law practitioners’ community. And indeed, the vast majority of the appointments to judicial positions came from the lawyers’ ranks. In the first Supreme Court, three out of the five Justices, including the Chief Justice, were former lawyers (Moshe Zmora, Menachem Donkelblum, and Yitzhak Olshan); one of the remaining two Justices was a former Mandatory district court judge (S. Z. Heshin) and the other was an Orthodox Rabbi and an expert in Jewish law (Rabbi Simcha Assaf). Moreover, the appointed Justices were part of the legal elite of Palestine and two of them (Zmora and Donkelblum) had served as chairmen of the Palestinian Bar Association.⁴⁸ The same phenomenon can be identified in appointments to lower judicial positions. Of the forty-four judges appointed to the district and magistrates’ courts before 1951, twenty-seven were lawyers, thirteen were government officials (most if not all of whom had a legal education), three were ex-army servicemen, and one was a professor.⁴⁹

As a result, in the early stages of the Israeli judicial system the strong bonds that existed between judges and lawyers stemmed not only from shared professional interests and goals but also from similar backgrounds and strong personal ties.⁵⁰ The source of that similar professional identity, however, had much deeper roots than a common social milieu. These

⁴⁷ *Id.* at 73. Ronen Shamir rejects the idea that the State of Israel symbolizes the abolishment of the British Mandate regime and argues that in fact the Zionist project owes its existence to the colonial British administration. This is all the more true in the case the legal system. See SHAMIR, *THE COLONIES*, *supra* note 16, at 6-29 (discussing the enigma of the missing colonial state from Zionist historiography). For the purposes of this article, however, what interests us is the prevalent consciousness as to the relationship between the British colonial regime and the State of Israel, and this consciousness is reflected in Rubinstein’s book.

⁴⁸ RUBINSTEIN, *supra* note 35, at 69-73.

⁴⁹ *Id.* at 57.

⁵⁰ This is manifested in the following example: While serving as the chairman of the Palestine Bar Association, Moshe Donkelblum (later a Supreme Court Justice) declared: “[O]ur organization is not a political association. Each one of us belongs to his own political organization and there he expresses his activity . . . [W]e must take care only of those political questions which have direct bearing on our profession or on the legal reality.” GAVRIEL SHTRASSMAN, *WEARING THE ROBE: A HISTORY OF THE LEGAL PROFESSION UNTIL 1962*, at 166-67 (1985). It is reasonable to assume that Donkelblum carried with him his ideology as to the relationship between law and politics and the role of lawyers in society, formed during many years of practice and professional activism, into the years of his judgeship.

roots, which account for the continuing existence of the legal profession as a unified body for over two decades, are the status of jurists and the place of legal institutions in the *Yishuv* and subsequently in early Israeli society. As previously discussed, lawyers in Mandate Palestine strongly identified with and adopted the British legal culture and ideology.⁵¹ This ideology was carried into the period of statehood and, naturally, found its way into the newborn judiciary, a judiciary filled with lawyers. Consequently, in the first period of statehood, lawyers and judges shared the same inherited British legal culture and ideology.⁵²

This ideology, characterized by a highly individualistic and liberal free market orientation, was not shared by the majority of Israeli society. The central values of Zionism stood in disjunction to those represented by both the Bar and the judiciary.⁵³ The dominant ideology in early Israeli society was collectivist and perceived the individual as an instrument for the implementation of the State's objectives. "The view of the individual as the carrier of collective ideals and as subordinate to them," argue Horowitz and Lissak, "was a common thread characterizing the otherwise antagonistic camps of the left-wing pioneers and the right-wing nationalists. Both ideological approaches demanded the individual, albeit in different ways, to be prepared to sacrifice personal interest and put him or herself at the service of the movement which embodied the needs of the collectivity."⁵⁴ The fundamental value of early Israeli society was

⁵¹ See *supra* notes 26-27 and accompanying text.

⁵² One important qualification is in place. A recent article analyzing the biographies of Supreme Court Justices in the early years of statehood points to the emphasis put by Israeli historiography on the role of the Anglo-American tradition in shaping Israeli jurisprudence and legal institutions and the parallel neglect of the important role played by German legal tradition. The article points out that a significant number of Justices (i.e. two of the five first Supreme Court Justices) received their legal education in German institutions, a fact that left imprints on their legal culture and ideology. See Ali Salzberger & Fania Oz-Salzberger, *The German Tradition of the Israeli Supreme Court*, 21 TEL-AVIV U. L. REV. 259 (1998). These findings do not, however, affect the thesis of this article for two reasons.

First, the Justices who received their legal education in Germany immigrated to Palestine early in their professional careers and conducted their legal practices under the Mandatory administration. Justice Zmora, for example, studied law in Berlin and Heidelberg, came to Palestine in 1922, and worked at a prominent Jewish-Palestinian law firm until the end of the British Mandate. Likewise, Justice Donkelblum received his law degree from a university in Vienna, immigrated to Palestine in 1919, and served for many years as the legal advisor to the Zionist Movement administration. Thus, the structural or institutional impact of British legal administration is as relevant to them as to any other Palestinian lawyer. Moreover, in spite of significant differences between the German and the British legal traditions, both share formalist and positivist legal ideology and an admiration of professionalism. Consequently, for our purposes, the differences are of minor importance.

⁵³ See Ziv, Human Rights, *supra* note 18, at 45.

⁵⁴ DAN HOROWITZ & MOSHE LISSAK, TROUBLE IN UTOPIA: THE OVERBURDENED POLITY

“sacrifice”—the sacrifice of the individual’s life for the common good—which found its expression in the redemption of the land through settlement, agriculture, absorption of Jewish immigrants, and “defense” actions.⁵⁵ The idealized and admired social type was the *Halutz* (pioneer), the “new Jew,” who rejected the characteristics and activities that were tied in the collective consciousness to the Diasporic Jew.⁵⁶

Lawyers and others involved in legal administration were the outright antithesis to the pioneer’s image. In the collective imagination, largely dictated by the ruling labor party *Mapai*, the legal profession was perceived as an urban bourgeois profession, a profession which, like those of the merchant and the loan shark, was typical of the Diaspora Jews and was thus despised and marginalized by Israeli society.⁵⁷ Alfred Vitkon, a jurist who became a Supreme Court Justice in 1954, described the marginal place of the legal profession in early Israeli society: The spirit of pioneering, he wrote, “oriented them first and foremost to agricultural settlement and redeeming the land, in which they saw the primary condition for the revival of the nation, while the legal profession, along with other occupations the Jews excelled in the Diaspora, were considered loathsome.”⁵⁸ Vitkon further described a society in which legal rules and institutions were perceived as obstacles. He explained this phenomenon as a remnant of the Mandate period in which draconian laws were imposed on Jews and as a result the rule of law did not rank high among the values of society.⁵⁹ Moreover, the liberalism and individualism that characterized the legal profession were incompatible with the prevalent social code of behavior that included egalitarianism, modesty, and collective solidarity.⁶⁰

OF ISRAEL 110-111 (1989).

⁵⁵ MAUTNER, *supra* note 31, at 122.

⁵⁶ See HOROWITZ & LISSAK, *supra* note 54, at 100, 106-07.

⁵⁷ RUBINSTEIN, *supra* note 35, at 27.

⁵⁸ Alfred Vitkon, *Ha-Mishpat Be'erez Mitpatachat* [The Law in a Developing State], in SEFER HA-YOVEL LE-PINHAS ROSEN [JUBILEE BOOK IN HONOR OF PINCHAS ROSEN] 66, 72-73 (Haim H. Cohen ed., 1962); see also Itzhak Olshan, DIN U-DEVARIM: ZIKARONOT 240 (1978) (Itzhak Olshan, a former Supreme Court Justice, described in his memoirs the hostility of state officials toward the courts: “In the eyes of a few ministers, and especially in the eyes of senior officials—even if not expressed in public—the Supreme Court Justices were perceived as ‘too superior creatures’ . . . we often had to confront disrespect on behalf of part of the [state’s] bureaucracy”).

⁵⁹ *Id.*; see also PNINA LAHAV, JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY 86 (1997) (explaining the social marginality of legal institutions in early Israel by arguing that “[t]he political culture of the *Yishuv* contained deep streaks of lawlessness” originating in the British Mandate).

⁶⁰ See Ziv, Human Rights, *supra* note 18, at 48 (“Lawyers’ occupation with formalistic legality, honorable behavior, civility, and proper attire did not correspond with those norms. Such formalism was considered an inferior quality and stood in discord with a culture which emphasized improvisation, flexibility and genuine creativity.”).

These circumstances resulted in the marginal positioning of lawyers, judges, and the justice administration as a whole in the early years of statehood. In the political sphere, in the first two decades few lawyers attained key positions in Israeli political leadership. *Mapai*, the ruling party, employed a very small number of lawyers in its higher-ranking institutions⁶¹ and in the first six parliament (*Knesset*) terms, only about two to six percent of parliament members were former lawyers or jurists.⁶²

The marginalization of the judiciary is apparent from the mean-spirited and even abusive attitude of the State toward the judiciary in general and particularly toward the Supreme Court.⁶³ This marginalization was physically symbolized in the decision to locate the Supreme Court in a "humble" house in Jerusalem rather than in Tel-Aviv, where all other State offices were located. This decision, made by State officials against the explicit will of the Supreme Court Justices, pointed to the lower status of the Court compared to that of other government bureaus.⁶⁴

The condition of political and social marginalization of the legal profession fostered a structural system of interdependency between lawyers and judges. Lawyers organized their profession around the judiciary as a state institution and drew their authority as guardians of the rule of law (in the formalistic sense) from their proximity to the judiciary.⁶⁵ At the same

⁶¹ See RUBINSTEIN, *supra* note 35, at 27-28.

⁶² See Ronen Shamir, *Society, Judaism and Democratic Fundamentalism: On the Social Sources of Judicial Interpretation*, in A JEWISH AND DEMOCRATIC STATE 241, 252 (Ariel Rosen-Zvi ed., 1996) [hereinafter Shamir, *Democratic Fundamentalism*] (arguing that the number of parliament members who are former lawyers in Israel was one of the lowest in the Western world).

⁶³ See LAHAV, *supra* note 59, at 85-86:

Stories from the period abound, describing a mean-spirited attitude toward the judiciary. The justices were not included in the list of regular invitees to formal ceremonies and public events. Negotiations concerning salary and benefits were always adversarial and frequently humiliating. The Ministry of Foreign Affairs, in an inexplicably niggardly mood, refused to issue to the justices diplomatic passports for travel, despite agreement that they were equal in status to cabinet ministers.

⁶⁴ See *id.* at 83-84.

⁶⁵ Stephen Botein describes a somewhat similar dependency in the American legal profession in the nineteenth century. According to Botein, the Bar used the judiciary's image and proximity to the state in order to promote their own goals: "Prominent lawyers first defined and extolled judicial office in such a way as to promote a general image of themselves as a kind of 'traditional' intelligentsia, ostensibly as 'autonomous' as the clergy." Stephen Botein, *What We Shall Meet Afterwards in Heaven': Judgeship as a Symbol for Modern American Lawyers*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 49, 50 (Gerald L. Geison ed., 1983). Having said this, an important distinction between the American and the Israeli circumstances should be noted: In the American context the bond between lawyers and judges was created against the background of the weakness of the state, while in Israel bonds were created under a condition of a very strong and centralist state.

time, the main concern of the judiciary, in the absence of other sources of social status and legitimacy, was to retain its dominant position within the legal profession. The most pressing issue for both lawyers and judges was retaining and strengthening their status as professionals. Professionalism was a means to associate themselves with the state and to reap the benefits ensuing from such proximity, but to nevertheless avoid the massive intrusion of the strong centralist State into their work. Lawyers and judges combined efforts to build a professional and autonomous legal sphere that would separate them from the political arena.⁶⁶

One of the central mechanisms with which to achieve an autonomous professional sphere was resort to legal formalism.⁶⁷ Legal formalism, as described above, imparted to the legal discourse an image of a scientific professional discourse uninfluenced by political forces.⁶⁸ Hence, legal formalism assisted the judiciary in retaining respect for its rulings in a suspicious and sometimes even hostile political and ideological environment,⁶⁹ and served the lawyers in their struggle to secure a market for their services. Their efforts were fruitful and by the 1970s, despite the hegemonic collectivist culture and the powerful centralist State, the legal profession was "the first group to demand and receive, an autonomous and independent status."⁷⁰

⁶⁶ See Ziv, *Human Rights*, *supra* note 18, at 53 ("[D]uring the first two decades of Israeli statehood lawyers managed to avoid the influential forces of statehood and collectivism Unassociated with the ethos of nation building, lawyers preserved their social status by strengthening an enclave of professionalism.").

⁶⁷ There is an ongoing debate between Menachem Mautner and Ronen Shamir concerning the origins of the formalistic ideology of the Israeli judiciary in the early years of statehood. Mautner claims that by that time the judges had already developed a strong liberal conviction that perceived the individual as the supreme and absolute end whose will should be validated without consideration of the social collective good. In this framework, the judiciary conceived of the state as an instrument that is designed to enable the aggregate of individuals to fulfil their will. See MAUTNER, *supra* note 31, at 122-23. However, continues Mautner, due to the immense disparity between the ideals and values of the judges and those prevailing in society, the court could not express its liberal values explicitly because its legitimacy would have been completely lost. See *id.* at 123. The formalistic approach served the need of the judiciary in its problematic status as "culturally estranged." See *id.* Legal formalism enabled the judiciary to conceal the value dimension of its decisions and to present the judicial process as a mechanical one: it allowed the judges to downplay the cultural gap that existed at that time between the court and the general society and the avant-garde role it fulfilled for the state and society. See *id.* at 122-23. Shamir, on the other hand, believes that the judges of that time were not liberals who "suppressed their will" but formalistic lawyers with a restrictive viewpoint as to their institutional role who willfully accepted the "political" hegemony and the authority of the state's sovereignty discourse. See Shamir, *Democratic Fundamentalism*, *supra* note 62, at 241.

⁶⁸ MAUTNER, *supra* note 31, at 123.

⁶⁹ MARTIN EDELMAN, *COURTS, POLITICS, AND CULTURE IN ISRAEL* 42 (1994).

⁷⁰ Ziv, *Human Rights*, *supra* note 18, at 54-65 (analyzing the success of legal professionalization through the Parliament deliberations around the enactment of the first

In sum, the first two decades of Israeli independence were characterized by shared professional interests and strong personal and ideological bonds between lawyers and judges emanating from their marginal status within Israeli society. The relative autonomy of the legal profession was the fruitful outcome of a joint project of the Bar and the judiciary.

C. The State of Israel—The Modern Years (1970-1990s)

The seeds of change that would ripen in the mid-1980s were beginning to form in the early 1970s. At the beginning of the 1970s, arguably due to the influence of American culture and ideology,⁷¹ the prevalent collectivist ideology began to transform. The new emerging culture was based on the liberal values of individualism and self-fulfillment.⁷² Economic conditions were changing: From a rather closed market, based on central state control, the economy shifted increasingly to a free market economy and the standard of living consistently rose.⁷³ These transformations in turn affected the professionalization processes across Israeli civil society. The middle class gradually released itself from the paralyzing grip of the state apparatus and began to develop what sociologist Ronen Shamir calls a “managerial ideology.”⁷⁴ This tendency is clearly manifest in the major structural transitions in the Israeli labor market between 1961 and 1983. The percentage of employees in agriculture and manufacturing declined from 47.1% of all employees in 1961 to 31.7% in 1983; the number of managers and members of the professions, on the other hand, increased from 15.1% of all employees in 1961 to 33.2% in 1983, a growth of more than one hundred percent.⁷⁵

Israeli Bar Association Act of 1961).

⁷¹ See, e.g., MAUTNER, *supra* note 31, at 125; Ran Hirschl, *Israel's 'Constitutional Revolution': The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order*, 46 AM. J. COMP. L. 427, 434 (1998).

⁷² See MAUTNER, *supra* note 31, at 125.

⁷³ HOROWITZ & LISSAK, *supra* note 54, at 97. The authors noted:

The decline in public entrepreneurship and the encouragement of private initiative by the state—which was until 1977 dominated by the Labor movement—meant removing the ideological stigma which had been attached earlier to ‘bourgeois’ occupations. A related development has been the rise in the importance of personal economic success as a source of prestige. As a result, the ideological stigma attached to the status symbols of economic success, such as conspicuous consumption, have also disappeared.

Id.

⁷⁴ Shamir, *Democratic Fundamentalism*, *supra* note 62, at 254 (a managerial ideology is an ideology that “speaks on behalf of a businesslike philosophy, which is cut off from ‘political’ and ‘ideological’ considerations—kind of a functional rejoinder to what is conceived of and prominently presented as a crisis of the state and its political authority”).

⁷⁵ See Vered Kraus, *Industrial Transformation and Occupational Change in the Israeli*

Amid this cultural transformation came a societal change of heart with regard to law and legal institutions. During the 1970s and even more so in the following two decades, law had come to play an increasingly important role within Israeli society, replacing political and social mechanisms. Areas that were traditionally considered outside the legal realm began to be conceptualized in legal terms. Within two decades Israeli society transformed from a society in which an appeal to the courts was unlikely, to the most litigious society in the western world.⁷⁶ A society in which "there is hardly a public-policy question . . . which does not sooner or later turn into a judicial one."⁷⁷ Legal discourse gradually became the discourse of the new professional-managerial class and the involvement of legal experts in shaping public policy was on the rise. Legislative procedures relied more on legal experts and the number of parliament members who were also lawyers almost tripled.⁷⁸ This social phenomenon, referred to as "legalization"⁷⁹ or "judicialization,"⁸⁰ dramatically changed the social status of the legal profession. Lawyers and judges found themselves in a new situation in which their values and ideology were in accord with those of the rest of society. They were no longer culturally marginalized and the liberal and individualistic convictions they held ranked increasingly higher in the hierarchy of social values.⁸¹

These cultural transformations produced differing reactions in the Bar and in the judiciary. The disparity in reaction is the bedrock of the ideological rift between lawyers and judges, which eventually led to the professional project of the judiciary. Before proceeding to a description of the different reactions, however, a brief theoretical review of the possible trajectories of professional projects is necessary.

"[T]he structure of professions," argues Magali S. Larson in her ground-breaking book *The Rise of Professionalism*, "results from two

Labor Force, 7 ISR. SOC. SCI. RES. 1, 7 (1992).

⁷⁶ Recent study shows that 102 new civil cases are filed with the Israeli courts per 1,000 residents per year, which amounts to the highest number of cases per population in the western world. Luke Nottage & Christian Wollschlager, *What Do Courts Do?*, 1996 N.Z.L.J. 370 (1996). The Israeli Supreme Court heard a total of 4,741 cases in 1988, 6,007 cases in 1991, 6,965 cases in 1994, and 10,529 cases in 1996. Hirschl, *supra* note 71, at 434 n.24 (quoting ISRAEL STATISTICAL ABSTRACT OF 1996 FORTY-SEVEN 462). The number of cases cited makes the Israeli Supreme Court one of the busiest courts in the world.

⁷⁷ Hirschl, *supra* note 71, at 435.

⁷⁸ See Shamir, *Democratic Fundamentalism*, *supra* note 62, at 255-56.

⁷⁹ In Hebrew, the term is *Mishpatizatsia*. See, e.g., Salzberger & Oz-Salzberger, *supra* note 52, at 260. For a criticism of the "legalized culture," see Ariel Rosen-Zvi, *Legal Culture: On Judicial Review, The Enforcement of Law and Inculcation of Values*, 17 TEL-AVIV U. L. REV. 689 (1993).

⁸⁰ See Hirschl, *supra* note 71, at 434.

⁸¹ MAUTNER, *supra* note 31, at 126-27.

processes: the process of organization for a market of services, and the process of collective mobility by which the early modern professions attached status and social standing to their transformed occupational roles.”⁸² Accordingly, professional projects have two dimensions: One is economic (market control) and the other social (collective mobility).⁸³ These dimensions are not mutually exclusive but can be pursued concurrently and are often inextricably linked.⁸⁴ Occasionally, however, they are pursued independently, as in the case of the professional elite, whose economic privileges are secured, and in the case of occupations that cannot achieve market control but still seek professional prestige.⁸⁵

Market control is the process by which “particular groups of people attempt to negotiate the boundaries of an area in the social division of labor and establish their own control over it.”⁸⁶ In other words, it is “the control by a small elite of professionals of the production of producers—recruitment, selection, the definition of competences—in order more successfully to control the production of . . . [professional] goods, imperative to market valorization.”⁸⁷

Collective mobility, on the other hand, is aimed at raising the social status and prestige of the occupational group. Social status is no doubt a central objective of professionalization initiatives and some social scientists go as far as insisting that professional projects are mainly or even exclusively concerned with status and prestige,⁸⁸ thus defining professions in terms of their social status.⁸⁹

The post-1970s Israeli legal profession was divided along these two dimensions of the professional project. While the Bar continued to pursue its traditional project of maintaining market control, the judiciary diverged, seeking instead social status and prestige through collective social mobility.

⁸² LARSON, *supra* note 8, at 66.

⁸³ See Richard L. Abel, *Theories of the Legal Profession: American Lawyers, in* LAWYERS: A CRITICAL READER 117, 118 (Richard L. Abel ed., 1997) [hereinafter Abel, *Theories of the Legal Profession*].

⁸⁴ See *id.*

⁸⁵ See *id.* at 121.

⁸⁶ LARSON, *supra* note 8, at xii.

⁸⁷ Yves Dezalay, *The Forum Should Fit the Fuss: The Economics and Politics of Negotiated Justice*, in LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION 155, 163 (Maureen Cain & Christine B. Harrington eds., 1994).

⁸⁸ See Mark J. Osiel, *Lawyers as Monopolists, Aristocrats, and Entrepreneurs*, 103 HARV. L. REV. 2009, 2027 (1990).

⁸⁹ See, e.g., Robert Dingwall, *Accomplishing Profession*, 24 SOC. REV. 331 (1976).

1. The Bar: In Pursuit of Market Monopoly

The central goal of the Israeli Bar since its establishment during the British Mandate has been control over the market for its services by the exercise of some form of social closure. Since its inauguration and throughout the first two decades of statehood, the Bar engaged in an ongoing project to secure its economic position through market control. An important landmark in this project was the enactment of the Israel Bar Association Act of 1961⁹⁰ (IBA Act) and the Professional Ethics Rules promulgated under it. The IBA Act set clear and strict boundaries distinguishing between members of the Bar and outsiders, preventing any form of non-member participation in the profession's jurisdiction.⁹¹ It also severely restricted competition within the profession by prohibiting self-advertisement⁹² and client solicitation.⁹³ In the same vein, the Ethics Rules made client loyalty, as opposed to the generation of justice for society at large, the supreme ethical obligation of the profession.⁹⁴ This tendency persisted and even expanded after the 1970s. With the emergence of the favorable new cultural and economic conditions, the Bar seized the opportunity to strengthen its grip over the market and to fortify its exclusive professional jurisdiction. In other words, lawyers translated their increasing professional authority into market monopoly. The Bar did not attempt,⁹⁵ nor was it able, to convert its professional status into normative authority.⁹⁶ Instead, it invested efforts in securing a market for its

⁹⁰ Israel Bar Association Act, 1961, S.H. 178.

⁹¹ See, e.g., *id.* at § 20 (prohibiting non-members of the Bar from representing people in any judicial or quasi-judicial forums, including arbitration, land registry, patent registry, companies registry, tax authorities and other official administrative bodies); *id.* at §§ 96-98 (criminalizing any "professional" activity carried out by non-members of the Bar and restricting members of the judiciary from accepting a fee from a non-lawyer engaging in professional exclusive activities).

⁹² *Id.* § 55.

⁹³ *Id.* § 56. Richard Abel argues that a crucial part of securing market monopoly is curtailing competition within the profession. See Richard L. Abel, *Revisioning Lawyers*, in *LAWYERS IN SOCIETY: AN OVERVIEW* 1, 2 (Richard L. Abel & Philip S.C. Lewis eds., 1995) [hereinafter Abel, *Revisioning Lawyers*].

⁹⁴ Rules of the Bar Association (Professional Ethics), 1986, K.T. 4965, 1373.

⁹⁵ See Ziv, *Human Rights*, *supra* note 18, at 68 ("Contrary to the Court, which assumed a value-oriented or substantive approach to law, the organized Bar did not attempt to convert its professional knowledge and expertise into any kind of ideological or normative authority."). My argument is not that the Bar was not interested in achieving moral authority, but that it was not the Bar's first priority and it chose instead to focus on enlarging the market for its services, constraining competition, and preserving its professional autonomy.

⁹⁶ In his book *Managing Legal Uncertainty*, Ronen Shamir casts doubts on the ability of lawyers to invoke their professional expertise in order to command moral authority. The reason he provides is the representational function of lawyers that prevents them from

professional services. Consequently, the lawyers continued to embrace and promulgate the formalistic traits of the law as a means of increasing their symbolic capital as professionals.

2. The Judiciary: In Pursuit of Moral Authority

The judiciary took its increasing professional authority along a completely different path. Unable to gain the financial benefits from market monopoly, the judiciary has since the 1970s engaged in a collective social mobility project to transform its professional authority into a moral power. In the pre-1970s ideological and political atmosphere, in which professional knowledge was subordinated to the State's logic, the ability of the judiciary to translate its professional authority into normative power was very limited. Public opinion, dictated by a powerful centralist State, identified jurists with anti-social values and thus ascribed very little moral authority to legal expertise.⁹⁷ From the 1970s onward this has no longer been the case. As described above, the court's values and ideology increasingly coincided with those of society at large, and the judiciary, under the leadership of the Supreme Court, could embark on the project of assuming a role of moral guidance. The legal formalism that served the judiciary so well in the past did not suit its purposes any more and was replaced by a "values" rhetoric that characterizes the Court to date.⁹⁸ The trajectory chosen by the Court is manifested in the words of the current Chief Justice, Aharon Barak, who stated in 1977:

As judges we are not limited to interpreting and operating the existing laws. We are the spear's edge of the aspiration to a more desirable and better law We are the architects of social change. We have the abilities to build a better and a more just legal system. We do not see our role as limited to legal technocracy, but we perceive our role to include legal statesmanship.⁹⁹

defending their own vision of the law. RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL* 11, 37-64 (1995) [hereinafter SHAMIR, *MANAGING LEGAL UNCERTAINTY*].

⁹⁷ See Shamir, *Democratic Fundamentalism*, *supra* note 62, at 253.

⁹⁸ Ronen Shamir argues that the new so called "value discourse" that characterizes the Court does not, in fact, reflect a transition from a formalistic to a non-formalistic discourse but occurs wholly within the formalist paradigm. See Ronen Shamir, *The Politics of Reasonableness: Reasonableness and Judicial Power at Israel's Supreme Court*, 5 *THEORY & CRITICISM* 7, 8-9 (1994) [hereinafter Shamir, *The Politics of Reasonableness*].

⁹⁹ Aharon Barak, *The Rule of Law*, in *COLLECTION OF LECTURES DELIVERED AT THE SEMINAR FOR JUDGES 1976* (Shimon Shetreet ed., 1977). With regard to such rhetoric, Ronen Shamir observed:

This view heralded an era of legal architecture in which the claim to judicial expertise was based on a much stronger justification than the one that was heard in the past. The judge of the older generation claimed an analytical expertise and a proficiency in the inner rules of the legal system. His reason

As a result, the shared interests and professional bonds that tied the legal profession together in the first two decades began to loosen during the 1970s. The formalistic approach that still characterized the Bar no longer corresponded to the agenda of the judiciary and in the early 1980s, the judiciary finally turned its back on the strong free-market values it had helped to foster and which were still the cornerstone of the lawyers' professionalism.¹⁰⁰

The 1980s presented the next landmark shift.¹⁰¹ By the mid-1980s, the judiciary had managed to achieve formidable moral status and high prestige within the Israeli society. The courts came to be regarded as a leading institution enjoying enormous public trust. An international survey in the mid-1980s revealed that the Israeli judiciary was ranked *first in the world* in the degree of public confidence enjoyed,¹⁰² and a survey conducted from 1987 to 1990 found that the Israeli judiciary commanded between 77.8% to 82.5% of the public trust, second only to the Israeli Defense Forces.¹⁰³ In a survey of the Israeli Jewish population from 1991, more than 70% of the respondents answered that they considered the High Court of Justice (the Israeli Supreme Court) the institution with the highest moral authority in Israel.¹⁰⁴ And, according to another survey, judgeship was the most prestigious profession of the 1990s, replacing physicians who occupied the head of the pyramid throughout the 1980s.¹⁰⁵

By the mid-1980s, the ideological rift between the Bar and the bench, coupled with the drastic decline in their shared interests, created an awareness in the judiciary of the distinction between judging and lawyering

was that of the expert who is committed to the principles of coherency and consistency of the law. The new generation . . . did not forgo these claims but added to them an explicit promise to a 'better and more just' management and control; to reasonable professionalism as creative practice that translates the social to legal.

Shamir, *The Politics of Reasonableness*, *supra* note 98, at 7.

¹⁰⁰ MAUTNER, *supra* note 31, at 130-32 (Mautner claims that the increasing imposition of the "good faith" doctrine on private contracts since the late 1970s is part of an attempt of the courts to challenge the extreme free-market economy).

¹⁰¹ *Id.* at 9 ("Anyone who is familiar with the Israeli legal world knows that in the eighties it underwent substantial changes that were initiated by the Supreme Court.").

¹⁰² Twenty-nine percent of the Israeli population expressed complete confidence in the judiciary and 38% exhibited considerable confidence. Only 12.4% of the population said that they had little or no confidence in the courts (as against 27.7% of the population in the United States and 61.4% in Italy). See GAD BARZILAI ET AL., *THE ISRAELI SUPREME COURT AND THE ISRAELI PUBLIC* 55 (1994).

¹⁰³ See Ephraim Yuchtman-Ya'ar & Yochanan Peres, *Public Opinion and Democracy After Three Years of Intafada*, *ISRAELI DEMOCRACY* 24 (Spring 1991), *quoted in* EDELMAN, *supra* note 69, at 45.

¹⁰⁴ BARZILAI, *supra* note 102, at 211.

¹⁰⁵ See Vered Kraus, *I Chose a Different Life Style*, *AT*, July 1999, at 87.

and caused them to assert and sharpen the differences. Moreover, with the peaking of its moral authority and social prestige, the judiciary began to perceive a close relationship with the Bar as not only in vain but even harmful. The reputation of lawyers, which was not strong in the first place,¹⁰⁶ deteriorated over the years. Popular image portrayed lawyers as a greedy and manipulative group of people with a “flexible” moral sense, and their professional association was seen as a “dubious establishment.”¹⁰⁷ The low public regard for the profession swelled in the 1980s with enormous growth in the number of lawyers practicing¹⁰⁸ and the ensuing fierce competition among them. As a result, the morally elevated judiciary of the 1980s, seeking the ability to transform its expertise into greater political and social power, could not allow itself anymore to be associated with the Bar. In other words, the collective mobility project of the judiciary required the dissolution of the legal profession and the construction of an independent professional identity. I refer to the collection of strategies, techniques, and practices used by the judiciary to dissociate itself from the Bar and to set up a distinct judicial profession as the “professional project” of the judiciary.¹⁰⁹

It should be emphasized that I do not, in any way, argue that there was a conspiracy or even deliberate action on the part of the judges to dissociate themselves from the lawyers.¹¹⁰ What in fact happened is that the rift between the Bar and the judiciary broadened over the years to a point at which judges increasingly began to perceive their occupation as distinct from lawyering and acted accordingly. The professional project can be

¹⁰⁶ SHTRASSMAN, *supra* note 50, at 166-67 (quoting Moshe Donkelblum, the Chairperson of the Jewish Bar Association in Palestine in the early 1940s: “True, lawyers do not have the best public reputation, but this has always been so and in all countries”).

¹⁰⁷ See, e.g., Ilan & Tsitrin, “*What is Happening in the High Court of Justice is Outrageous*,” *supra* note 3, at A12 (quoting a member of Parliament referring to the chairman of the Bar and to the Bar Association as “a dubious person who stands at the head of a dubious establishment”).

¹⁰⁸ See COMMISSION FOR EXAMINATION OF THE STRUCTURE OF THE ORDINARY COURTS IN ISRAEL, MINISTRY OF JUSTICE OF ISRAEL, REPORT OF THE COMMISSION FOR EXAMINATION OF THE STRUCTURE OF THE ORDINARY COURTS IN ISRAEL 27 (1997) (on file with author) [hereinafter OR COMMISSION REPORT]. For a discussion of the Or Commission, see *infra* notes 180-81 and accompanying text.

¹⁰⁹ This concept of professional project, borrowed from Magali Larson, emphasizes the “coherence and consistence that can be discovered *ex post facto* in a variety of apparently unconnected acts.” LARSON, *supra* note 8, at 6. “According to Webster,” continues Larson, “‘project’ means ‘a planned undertaking.’” As the term is currently used in sociological analysis, it does not mean that the goals and strategies pursued by a given group are entirely clear or deliberate for all the members, nor even for the most determined and articulate among them.” *Id.*

¹¹⁰ See Abel, *Revisioning Lawyers*, *supra* note 93, at 2 (“This concept of the ‘professional project,’ adapted from Larson . . . does not require deliberation or conspiracy . . . Even a genuine dedication to ensuring quality inevitably promotes social closure.”).

understood, in philosopher and political scientist Charles Taylor's words, as a kind of "purposefulness without purpose."¹¹¹ We can recognize, argues Taylor, certain purposefulness in people's action where their motivation and goals are unacknowledged or perhaps unacknowledgeable. "[A]side from the particular conscious purpose which agents pursue in their given context, there is a discernible strategic logic of the context itself, but this cannot be attributed to anyone as their plan, as their conscious purpose."¹¹²

D. "Professional Project" and "Legal Field": Some Methodological Clarifications

At this stage it might be useful to put forward two key methodological points that guide this article. First, the professional project of the judiciary is of a peculiar character. Professional projects are usually launched by occupational groups that strive to attain social and economic privileges by becoming a profession.¹¹³ This model does not fit our case. When embarking on its professional project, the Israeli judiciary was already a sub-profession within a functioning legal profession that also included lawyers both from the private and the public sectors and law teachers. The legal profession as a whole underwent professionalization as early as the Mandatory years and managed to achieve social closure and to secure an autonomous professional enclave within the centralist State of Israel in its early years.¹¹⁴ The professional project of the judiciary is of a different nature. It is the project of a sub-profession struggling to dissociate itself from the rest of the profession. Hence, the problems faced by the judiciary are different from those encountered by an occupational group launching its initial professional project. The problem for the judiciary is not so much gaining an image of professionals in the public, but distinguishing itself from a very similar group from which, to a large extent, it originated, and with whom it shares the same formal training and a similar body of knowledge.¹¹⁵

¹¹¹ Charles Taylor, *Foucault on Freedom and Truth*, in *FOUCAULT: A CRITICAL READER* 86 (David Couzens Hoy ed., 1986).

¹¹² *Id.* at 85-86.

¹¹³ See LARSON, *supra* note 8, at x-xviii.

¹¹⁴ See *supra* note 70 and accompanying text.

¹¹⁵ A professional project with similar characteristics to that of the Israeli judiciary was undertaken by an American law teacher at the beginning of the twentieth century. Exasperated with their marginal position in the legal field, law teachers revolted against the legal profession by adopting legal realism. According to Ronen Shamir, legal realism should be treated "as a 'collective mobility project' that enhanced the status and influence of a particular segment of the legal profession, namely legal academics. This project took place *within* the legal field through an intraprofessional struggle over the symbolic and material resources that constituted the field's hierarchy." SHAMIR, *MANAGING LEGAL*

Second, the professional project, the different social actors taking part in it, and the rhetoric used to describe it (such as disjunction, separation, distinction, etc.) should be understood through the theoretical lens of the “social field.” The notion of “social field,” borrowed from sociologist Pierre Bourdieu, is a structural concept that “captures the conditions of competition and conflict, yet at the same time cooperation and mutual dependence, to which the various actors in the field are subjected.”¹¹⁶ Such a field “presupposes a pervasive set of ideas, norms, procedures, and practices that, however unstable they might be, structure the range of possibilities for the relevant actors within it and mark the boundaries of their legitimate action. The field, in this sense, both constrains and enables action.”¹¹⁷

The various actors in the legal field, including judges and lawyers, are trapped in a complex web of institutional and structural networks from which they cannot depart. They are linked through shared education and a joint body of legal knowledge. Furthermore, lawyers and judges are bound by their shared interest in preserving and promoting the eminent status of the “rule of law.” The symbolic status of the law, and the belief in the need for legal agents and institutions to sustain it, are a main source of legitimacy for the legal profession as a whole. The legitimacy of both lawyers and judges rests upon a certain “division of labor” between them in maintaining the system of justice. Therefore, the situation is much more complicated. The judiciary distances itself from the Bar but at the same time is aware of the necessity to protect the respectable image of the legal profession as a whole. “Given their independent relationship, too much loss in the legitimacy of the [legal] profession will inevitably result in some lessening of the legitimacy of the court.”¹¹⁸ In other words, when dealing with lawyers, the courts should take precautions not to break the fragile equilibrium in a way that might backfire and hurt it.

As a result, the judiciary conceded that the main goal of the Bar is to serve as a professional union. Likewise, “the court embraced and reinforced the acclaimed doctrine forwarded by the Bar regarding lawyers’ roles in the justice system and about the nature of legal representation.”¹¹⁹

UNCERTAINTY, *supra* note 96, at 136.

¹¹⁶ *Id.* at 6 (providing a useful summary of Pierre Bourdieu’s methodology as presented in his books *THE LOGIC OF PRACTICE* (1990) and *OUTLINE OF A THEORY OF PRACTICE* (1977)).

¹¹⁷ *Id.*

¹¹⁸ Ziv, Human Rights, *supra* note 18, at 73.

¹¹⁹ *Id.* See, e.g., AIB 1747/91, *John Doe v. S. Dist. of the Israeli Bar Ass’n*, 46(4) P.D. 397, 402. The Court noted that:

Full trust between a lawyer and a client is the heart and soul of the legal profession and it is hard to conceive how one can maintain the lawyer-client

In other words, the judiciary conveyed the idea that the loyalty of lawyers to their clients is indeed their primary professional obligation, as opposed to the judges whose professional role is to promote justice and whose "client," so to speak, is society at large, thereby fixing the subordinate position of lawyers and distancing itself from them. At the same time, the courts joined the Bar in guarding the honor and respectability of the legal profession, and reacted harshly against lawyers who behaved in a way that degraded the honor of the profession.¹²⁰

II. THE ISRAELI JUDICIARY: TOWARD A JUDICIAL PROFESSION

Part I of this article established the historical and sociological thresholds leading to the professional project of the judiciary. Part II maps the contours of the professional project and illustrates its difficulties and limitations. It begins by reviewing different theoretical perspectives on the professionalization process, attempting to find a suitable theoretical framework for the professional project of the judiciary. It then explores the specific mechanisms and practices used by the judiciary in constructing its new professional identity.

A. *The Professionalization Process—Theoretical Perspectives*

Three principal theoretical schools can be identified within the sociology of the professions: the Weberian, the Marxist, and the functionalist or structural-functionalist, with its roots in the work of Emile Durkheim.¹²¹ The first to study the professions were the functionalists, who dominated the field until the late 1960s. For the functionalists, the critical issue is social order and hence the appeal of the professions that "appear[] to offer one antidote to the insidious poison of selfish materialism."¹²² The functionalists portrayed the professions as "collegial bodies of experts who used their expertise in order to solve society's problems and to advance the common good,"¹²³ and argued that the professions are the only social agents that could "save modern society from the breakdown in moral authority"¹²⁴ The professions, claimed the functionalists, differ from other occupations by their altruistic nature and high ethical standards.

relationship without it. A lawyer who has misbehaved in this respect does not only harm his client alone . . . but hurts the image of all lawyers.

Id.

¹²⁰ See Ziv, Human Rights, *supra* note 18, at 74.

¹²¹ See ABEL, THE LEGAL PROFESSION, *supra* note 8, at 4.

¹²² *Id.* at 5.

¹²³ See SHAMIR, MANAGING LEGAL UNCERTAINTY, *supra* note 96, at 8.

¹²⁴ KEITH M. MACDONALD, THE SOCIOLOGY OF THE PROFESSIONS 2 (1995).

By the end of the 1960s, other schools had attempted to replace the functionalist's apologetic ideology with a critical theory of the professions. The functionalist approach was widely criticized for neglecting the power dimension in professionalism, the dimension which enables the professions to secure their claims and create a system of self-legitimization.¹²⁵ It was further criticized for "ignoring the exclusionary dimension of professional practice and the mystification of professional knowledge that came with the carefully constructed distance between the expert and the client."¹²⁶ Both the Marxist and the Weberian approaches to the professions emerged as a reaction to the dominant structural-functionalist school. Despite their differences,¹²⁷ both schools rejected the functionalist work as "ideological"¹²⁸ and stressed the role of monopoly, exclusion, and domination as the real motivation for professionalization in place of the functionalist notions of collegiality and trust. These two theoretical traditions are sometimes labeled jointly as the "power approach."¹²⁹ This part examines the professionalization process using the analytical framework of the power approach.

Professionalization is a social process through which service producers seek "closure and distinction on the basis of claims to expertise in a given field of knowledge."¹³⁰ To become a profession, either for the sake of symbolic benefits or economic ones, service producers must obtain

¹²⁵ TERENCE J. JOHNSON, *PROFESSIONS AND POWER* 37 (1972).

¹²⁶ SHAMIR, *MANAGING LEGAL UNCERTAINTY*, *supra* note 96, at 9.

¹²⁷ For Weberians, analysis focuses on the sphere of distribution; for Marxists, the focal point is the relations of production. The central question is how actors seek and attain competitive advantage within a relatively free market, which is structured by the state but is dominated by private producers. See ABEL, *THE LEGAL PROFESSION*, *supra* note 8, at 4. Thus, for instance, Eliot Freidson, a prominent Weberian scholar, uses the term "organized autonomy" in order to reflect the power granted to the professions by the state to control its work, by virtue of obtaining the support of the social and political elite. See ELIOT FREIDSON, *THE PROFESSION OF MEDICINE: A STUDY OF THE SOCIOLOGY OF APPLIED KNOWLEDGE* 71-72 (1975). For Marxists, who focus on the sphere of production, despite the changing modes of production, the relation of production has always defined a vertical division between two opposing classes. See generally Karl Marx & Friedrich Engels, *Manifesto of the Communist Party*, in *MARX-ENGELS READER* 469 (Robert C. Tucker ed., 2d ed. 1978). From this point of view, the professions are marginal (petty bourgeoisie). The fundamental question is whether the category of which professionals are a part is destined to ally itself with either labor or capital, or to constitute an independent force within the ongoing class struggle—a "new class." See ABEL, *THE LEGAL PROFESSION*, *supra* note 8, at 5.

¹²⁸ The notion of ideology is used here in the Marxist tradition to mean a worldview that does not reflect reality but serves to protect the interests of a certain privileged group. See Karl Marx, *The German Ideology*, in *THE MARX-ENGELS READER* 146 (Robert C. Tucker ed., 2d ed. 1978).

¹²⁹ See MACDONALD, *supra* note 124, at 4.

¹³⁰ SHAMIR, *THE COLONIES*, *supra* note 16, at 116.

social closure.¹³¹ A professional project is successful if the occupation manages to “close access to the occupation, to its knowledge, to its education, training and credentials and to its markets in services”¹³² Thus, in order to characterize the process the Israeli judiciary underwent as a professional project, one must demonstrate social closure, or at least attempts to establish social closure.

Social closure encompasses several complementary elements: Restrictive practices aimed at excluding non-professionals and safeguarding the profession’s jurisdiction; control over the production of professional producers, or control over entry into the profession and the socialization of new professionals; and last but definitely not least the production of exclusive professional knowledge and expertise.¹³³ These elements are inherently interconnected. Thus, for instance, the control over the production of professional producers is dependent on a prior claim to exclusive professional knowledge.

B. The Professional Project—Empirical Data

Several pieces of evidence that point to the existence of professional project of the judiciary and its activities in the mid-1980s can be identified:

- (1) Promulgation of Judicial Ethical Rules;
- (2) Establishment of an independent journal;
- (3) Transformation in the education and training for judges and the establishment of the Institute for Judicial Training for Judges;
- (4) Change in judicial career patterns; and
- (5) Production of professional knowledge and expertise.

Each of the above serves one or more of the elements needed for the achievement of social closure. The promulgation of ethical rules as well as the publication of an independent journal serve to exclude outsiders, strengthen internal collegiality, and raise the status of the judiciary. The shift in judicial career patterns and the transformation in training for judges function to transfer control over the production of professional producers to the hands of the judiciary. Lastly, the discourses of judicial disqualification and judicial discretion discussed below assist the judiciary in producing exclusive professional knowledge and expertise. None of these elements

¹³¹ See ABEL, *AMERICAN LAWYERS*, *supra* note 8, at 20; see also MACDONALD, *supra* note 124, at 35 (“The overall strategy of a professional group is best understood in terms of *social closure* [T]his Weberian concept offers a basis for understanding the progress (or otherwise) of the professional project, the conflicts and interaction that develop between and within occupations”).

¹³² MACDONALD, *supra* note 124, at 29.

¹³³ See LARSON, *supra* note 8, at x-xviii. See also MACDONALD, *supra* note 124, at 1-35.

standing alone is sufficient to prove the existence of the professional project. However, the accumulation of all of them together around the same time period—the mid-1980s—points to the presence of such a project. This article now proceeds to a detailed analysis of the specific elements of the professional project.

1. Exclusionary Practices

a. Self-Regulation—Promulgation of Ethical Rules

All students of the professions consider the promulgation of codes of ethics as one of the hallmarks of the professionalization process. For the functionalist school, introduction of ethical rules signals the culmination of the professional project. It brings to light the altruistic nature and high ethical standards of the professions that differentiate them from other occupations.¹³⁴ Ethical rules, however, are also considered a significant element in the professionalization process by critical scholars, albeit for very different reasons.¹³⁵ According to the power approach, “professional associations promulgate ethical rules more to legitimate themselves in the eyes of the public than to engage in effective regulation.”¹³⁶ Codified standards can generate symbolic benefits by legitimizing the profession and enhancing its status and self-image through the declaration of moral superiority.¹³⁷ Therefore, although ethical rules do not tell us a thing about what the professions really are, they tell us a lot about what they pretend to be. Ethical rules can also assist the profession in other aspects of the professionalization process, such as “constraining competition; preserving autonomy; and reconciling client, colleague, and institutional interests.”¹³⁸

¹³⁴ See, e.g., C. Ray Jeffery et al., *The Legal Profession*, in SOCIETY AND THE LAW: NEW MEANINGS FOR AN OLD PROFESSION 313, 345 (F. James Davis et al. eds., 1962) (“One of the marks of a profession is a code of ethics. A profession involves a sense of service and responsibility to the community, and the conduct required of a professional man is above that required of other men.”); Howard M. Vollmer & Donald L. Mills, *Codes of Conduct*, in PROFESSIONALIZATION 129 (Howard M. Vollmer & Donald L. Mills eds., 1966) (“[E]thical codes, per se, have been more often associated with the most highly professionalized occupations.”). For a general survey of ethical standards see, A.M. CARR-SAUNDERS & P.A. WILSON, *THE PROFESSIONS* 421 (1933), and EMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* (Cornelia Brookfield trans., 1957).

¹³⁵ See, e.g., ABEL, *AMERICAN LAWYERS*, *supra* note 8, at 42 (“One of the hallmarks that distinguish a profession from other occupations is the power and practice of self-regulation.”).

¹³⁶ *Id.* at 143.

¹³⁷ Cf. Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 668 (1981) (arguing that the ABA promulgates ethical rules as a mean of self-legitimization).

¹³⁸ Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 690 (1981).

In practice, argues sociologist Andrew Abbott, “[e]thics codes came late in professionalization not because they were a culmination of natural growth, but because they served the function of excluding outsiders, a function that became important only after the professional community had been generated and consolidated.”¹³⁹ This article will now address the Israeli Judicial Ethical Rules from the skeptical standpoint of the power approach.

In 1984, former Chief Justice Meir Shamgar¹⁴⁰ appointed a commission of four judges, chaired by the retired Chief Justice, Moshe Landau, to examine the issue of professional ethics for judges. The Commission was asked to determine whether written ethical rules were required, and if so, to recommend what their content should be. The period of appointment coincided with the culmination of the moral authority of the courts and hence expressed its desire to anchor and perpetuate the judiciary’s alleged supreme moral authority and to secure the entailed symbolic benefits.¹⁴¹ After a debate lasting almost a decade,¹⁴² the Judicial Ethical Rules came into effect in 1993.¹⁴³ The Rules regulate the conduct

¹³⁹ ABBOTT, *supra* note 8, at 5.

¹⁴⁰ Meir Shamgar served as the Chief Justice of the Israeli Supreme Court from 1983 to 1995.

¹⁴¹ As is the case with any ethical code, the Judicial Ethical Rules are addressed to those both inside and outside the judiciary. The Rules serve simultaneously the external purpose of presenting the profession as a morally elevated group and excluding outsiders, and the internal purpose of generating positive self-image and policing the professionals. See Rhode, *supra* note 138, at 693 (“Codes of ethics are useful insofar as they define a satisfactory self-image and help persuade the general public that practitioners are especially deserving of confidence, respect, and substantial remuneration.”).

¹⁴² In its report, the Landau Commission concluded that there was no reason to promulgate written ethical rules concerning judicial conduct on the bench or making general statements about the ideal character of the judge because these principles are deeply embedded in the Israeli national heritage and culture. *Report of the Commission to the Examination of Judicial Ethical Rules*, 6 ALON MA’ARECHET HA-SHIPUT [THE JUDICIAL SYSTEM JOURNAL] [hereinafter JUD. SYS. J.] 1, 5 (1985) [hereinafter *Landau Commission Report*]. As to conduct of judges off the bench, the Commission recommended the promulgation of binding conduct rules. See *id.* at 6-11. Justice Haim Cohen opposed the Commission’s recommendations not to promulgate ethical rules for judicial conduct on the bench claiming that “as long as there are no rules . . . the judges are in no-man’s-land and are left to determine rules of conduct for themselves, in accordance with their ‘individual’ instincts, be they good or bad.” Haim Cohen, *Reply to the Landau Commission Report*, 8 JUD. SYS. J. 1 (1986). He also suggested rules for judicial conduct on the bench that, in his opinion, should be included in the Judicial Code of Ethics. See *id.* at 2-7.

¹⁴³ JUDICIAL ETHICAL RULES (1993) (on file with author). The formal binding legal status of the Ethical Rules is ambiguous. On the one hand, the Rules have not yet been legislated by the parliament. On the other hand, former Chief Justice Meir Shamgar, who promulgated the Rules, argues that they are legally binding. See Hana Kim, *Shamgar and the Ethical Rules*, HA’ARETZ, Mar. 10, 2000, at 14. The legal status of the Ethical Rules was left undecided even after a recent discussion in the High Court of Justice. See H.C. 1622/00, Yoav Itzhak v. Honorable Aharon Barak, Chief Justice (Mar. 16, 2000), available at http://www.court.gov.il/mishpat/html/verdict/index_23.html (last visited Mar. 27, 2001).

of judges both on and off the bench. At the end of 1995, Chief Justice Aharon Barak appointed an Advisory Committee for Judicial Ethics, comprised of three members—a Supreme Court Justice, a district court judge, and a magistrates' court judge—to advise judges on issues concerning judicial ethics.¹⁴⁴ Their decisions are published in the Judicial System Journal.¹⁴⁵

Examination of the Ethical Rules reveals their role in supporting several aspects of the professional project. First, they enhance the status and self-image of the judiciary. As expected, the Rules deal extensively with the status of judges as individuals and the prestige of the judiciary as an institution,¹⁴⁶ setting high standards that substantiate the high moral authority of the judiciary.¹⁴⁷ Second, they enhance collegiality among the judges. By imposing on the judges collegial duties toward their fellow judges, the Rules serve to create a strong collective identity within the judiciary.¹⁴⁸ Third, they secure social closure. The Rules carefully

Their informal obligatory status, however, was highlighted and celebrated. The Justices, deciding the case on procedural issues, commented in dicta:

The Ethical Rules were not anchored in legislation The question whether they have binding legal status is disputed. But there is no dispute as to their binding moral status. Their moral status is derived both from the recognition in the moral authority of the Chief Justice to determine the behavior standards expected from judges and from the fact that no other rules were promulgated as to the appropriate judicial ethics standards. As far as we know the judges indeed acknowledge the importance of the Ethical Rules As long as these rules were not amended or abolished they will continue to guide the judges.

Id.

¹⁴⁴ See, e.g., *Decisions of the Ethics Committee*, 26 JUD. SYS. J. 25 (1997).

¹⁴⁵ See *infra* note 155 and accompanying text.

¹⁴⁶ The first chapter of the Ethical Rules titled "Principles" includes general statements about the required character of the judge. One such rule is Rule A(5) which states "[t]he following will characterize the judge and her way of life[:] . . . avoidance of any conduct unbecoming her status as a judge or that might harm the image of the judiciary." In addition, the Ethical Rules address many specific activities that, in the eyes of the drafters, might harm the status of the judiciary. See, e.g., JUDICIAL ETHICAL RULE A(7) (stating judges shall not be politically active); JUDICIAL ETHICAL RULE C(6) (judges shall not give character testimony); JUDICIAL ETHICAL RULE E(1)(d) (stating any occupation or position held by a judge off the bench must befit her status as a judge).

¹⁴⁷ In a lecture delivered to first-year law students, former Chief Justice Meir Shamgar explained the distinction between the Bar's Code of Ethics and the Judicial Ethical Rules, arguing that the idiosyncrasy of the duties imposed on judges lies in the duties' extra severity and extended constraining nature, reflecting the unique social and professional vocation of judges. See Meir Shamgar, *On the Ethics of the Jurist*, 11 TEL-AVIV U. L. REV. 171, 173 (1986).

¹⁴⁸ See, e.g., JUDICIAL ETHICAL RULE A(8) (requiring that judges treat their colleagues with respect, even when dissenting against them); JUDICIAL ETHICAL RULE D(12) (requiring that judges refrain from remarks, both written and oral, that might offend other judges or other judicial instances).

demarcate the boundaries of the profession, distinguishing between judges and non-judges and thus strengthening social closure.¹⁴⁹ Exclusion of lawyers is an important goal of the Ethical Rules. Rule F(2) generally prohibits judges from engaging in legal practice, and Rule F(5)(A) goes even further, discouraging judges from socializing with lawyers. This rule is particularly interesting. It opens with the general statement that judges are not required to cut off their social relationships with lawyers, but immediately proceeds to qualify this statement:

However, a judge will apply appropriate discretion in the company of whom he is seen and how people might perceive, in the circumstances, his presence in a certain company. A judge will prevent himself from any conduct that might make the impression of favoring a litigant or a lawyer with whom he is related in friendship relations, such as driving to or from the court in a lawyer's car.¹⁵⁰

Such a rule, which questions any association of judges with lawyers, undoubtedly has a chilling effect on any such association, and thus induces social disassociation of judges from lawyers.¹⁵¹

No less important than what the Ethical Rules express is what they omit. Unlike the Israeli Bar Association Act¹⁵² and Ethics Rules that associate the status of the profession with that of the bench and require the "perseverance of an honorable disposition towards the court,"¹⁵³ the

¹⁴⁹ See, e.g., JUDICIAL ETHICAL RULE D(5) (requiring that judges shall not reveal in public things that they heard in their procedures behind closed doors, and that they do not share with others, except for other judges, anything they heard in judges' consultations); JUDICIAL ETHICAL RULE F(6) (applying the previous rule to judges even after their retirement).

¹⁵⁰ The desire to prevent social relationships between judges and lawyers can also account for a rare 1987 judicial disqualification case in which Shamgar disqualified a judge who offered a ride in his car to an attorney at the end of the working day. See Cr.A. 599/87, Hubra v. State of Israel, 41(4) P.D. 614.

¹⁵¹ This is manifested in an interview with the president of the Tel-Aviv District Court, Judge Menachem Ilan published in the Tel-Aviv district's bar journal *Haglima* [THE ROBE]. Judge Ilan was asked to state his opinion on informal meetings between judges and lawyers. Judge Ilan rejected the idea, saying:

[O]ut of 10,000 lawyers in the district—9750 (maybe 9950) are people who deserve to be judges. There is no reason not to meet with them socially, but there are 50 that I would not want to pat me on the back and I cannot tell them that. Being a judge is a very costly. You enter social isolation. There are many things you cannot do. There is a price for the role and we pay it, but this distance must be maintained. The lawyers are also not all the same. There are people who misinterpret it [social relationships between judges and lawyers].

Edna Shekel, *Judges-Lawyers Relationship (An Interview with the Chief Judge of the Tel-Aviv District Court, Judge Menachem Ilan)*, THE ROBE, Feb. 1996, at 9.

¹⁵² Israel Bar Association Act, 1961, S.H. 178.

¹⁵³ Rules of the Bar Association (Professional Ethics), 1986, K.T. 4965, 1373.

Judicial Ethical Rules do not impose any parallel duties on judges toward lawyers. The absence of such duties is even more conspicuous when one considers that Justice Cohen's proposed ethics code included a rule asserting the obligation of the judge to behave respectfully toward lawyers.¹⁵⁴ Therefore, the omission of any such duty was not done absent-mindedly, but intentionally.

b. Production of an Independent Law Journal

In 1984, a new journal, *Alon Ma'arechet Hashiput* (*The Judicial System Journal*), was established. The *Journal* is published by the judiciary and is dedicated to judges and judicial work. The *Journal* contains, among other things, articles written mostly by judges on varied judicial issues, new appointments to judicial offices, announcements of the Institute for Judicial Training for Judges, new legislation concerning the judiciary, and auxiliary material for adjudication (i.e. consumer price index, maximum fine rates, etc.).¹⁵⁵

The Israeli Bar has published its own journals since its establishment.¹⁵⁶ The judiciary of the 1980s, with its dawning awareness of its distinctiveness, established its own journal at least partly as a symbol of independence from the rest of the legal profession.

2. Production of Professional Producers

a. Education and Training of Judges

Education plays an important role in the professionalization process, a role that stems from the centrality of knowledge in the life of professions.¹⁵⁷ Control over the education and training processes is crucial because it enables the profession to control both the socialization of its future members and the production of professional knowledge. In other words, control over education allows the profession to dominate the production of professional producers, which according to Larson is the core

¹⁵⁴ See Cohen, *supra* note 142, at 2-3. See also SHETREET, *supra* note 4, at 314.

¹⁵⁵ Examination of the *Judicial System Journal* reveals that its function is more social than academic. Although there are "academic" articles that deal with various legal issues, the journal as a whole cannot be compared to an American style law review. Thus, the corresponding examples in the Bar are journals such as *Orech Hadin*, *Haglima*, etc., and not *Hapraklit*, which is a law review published by the Bar.

¹⁵⁶ See, e.g., *Orech Hadin* [THE LAWYER] (The Israeli Bar Association Journal); *Haglima* [THE ROBE] (The Israeli Bar District of Tel-Aviv Journal); *Halishka* [THE CHAMBER] (The Israeli Bar District of Jerusalem Journal).

¹⁵⁷ For the centrality of knowledge to the professions, see *infra* note 191 and accompanying text.

of the professionalization process.¹⁵⁸ The production of professional producers tends to be associated with the university, since most professional education in modern societies occurs in institutions of higher education.¹⁵⁹

The Israeli judiciary has not yet accomplished a separate university education for nascent judges. Future judges continue to undergo the same legal education as future lawyers. This situation is cumbersome to the professional project of the judiciary. The absence of formal education for judges leaves the judiciary with less control over the production of the judicial producers as well as fewer opportunities to produce professional knowledge. In other words, the shared legal education makes it harder for judges to present themselves as distinct from lawyers. It is not surprising, then, that the absence of independent education was increasingly noticed by the professionalized judiciary of the 1980s.

A temporary solution was found in the establishment of the Institute for Judicial Training for Judges (Institute) in 1984. Although the Institute cannot fully replace a university education, it does serve as a transitory stage on the way to a formally separate education. In an article titled *Training of Judges for Judicial Office*,¹⁶⁰ Mordechai Ben-Dror, a prominent district court judge, described the circumstances that led to inauguration of the Institute. Over the years, he wrote, judges became increasingly aware that the current training for judges was insufficient. The absence of suitable education in the realm of "judging" led judges to decide cases according to rules from another realm—the legal realm—in which they acquired their education and of which they thus had better knowledge.¹⁶¹ Our legal system, continued Ben-Dror, imposes on the judge the duties to *reveal the truth* and to *do justice*,¹⁶² and thus appropriate training in these areas is necessary. No legal rule can help judges in carrying out this mission and no university class trains them for this job.¹⁶³ The experience of judges, concluded Ben-Dror, supports the conclusion that "it is not enough that the candidate for judicial office is a well-known lawyer. In addition, and precisely because judicial office is so different (in many

¹⁵⁸ See LARSON, *supra* note 8, at 50.

¹⁵⁹ ABBOTT, *supra* note 8, at 195 ("The association of universities with professions seems to follow ineluctably, because professions rest on knowledge and universities are the seat of knowledge in modern societies."). See also LARSON, *supra* note 8, at 50.

¹⁶⁰ Mordechai Ben-Dror, *Hachsharat Shofim Le-Kehumat Shfita* [The Training of Judges for Judicial Office], 4 HAMISHPAT 239 (1994).

¹⁶¹ See *id.* at 242.

¹⁶² See *id.* at 250. For a discussion of the ways in which the judiciary constructs and appropriates "doing of justice" as an exclusive professional knowledge, see *infra* note 214 and accompanying text.

¹⁶³ See Ben-Dror, *supra* note 160, at 239-42, 250.

respects) from practicing law, there is an increasing need for suitable training that would prepare the candidate for the shift.”¹⁶⁴ Ben-Dror’s central claim is, then, that judging is a different profession from practicing law and requires separate, additional training.

In 1982, Ben-Dror submitted a memorandum to the Chief Justice urging the implementation of judicial training.¹⁶⁵ The Chief Justice, in turn, appointed a Judicial Commission to recommend ways to improve the training for judges, and in 1984 the Institute for Judicial Training for Judges was inaugurated as an extension of the Supreme Court, chaired by a Supreme Court Justice.¹⁶⁶ The purposes of the Institute, according to its architects, are:

- (1) Deepening the professional knowledge in the realm of judging, including principles of judging and trial management;
- (2) Strengthening the professional ties with judges from other countries and encouraging Israeli judges to acquire knowledge from them;
- (3) Creating a social setting for meeting with other judges and learning from them; and
- (4) Providing training sessions for new candidates for judicial offices, in which the candidates are exposed to professional knowledge, and the judges who run the sessions (frequently Supreme Court Justices) are provided with the opportunity to examine the candidates.¹⁶⁷

The Institute, as revealed from its declared goals, provides a partial rejoinder to the need to control the production of professional producers, in the absence of a formal academic education. The Institute serves the following functions: production of professional knowledge, control over entry, and socialization of young professionals.¹⁶⁸

The professionalization of the judiciary also left its mark on legal academia. In the late 1980s, a new course in “Principles of Judging” was introduced in several Israeli law schools.¹⁶⁹ And in the early 1990s, the

¹⁶⁴ *Id.* at 244.

¹⁶⁵ See Ben-Dror, *supra* note 160, at 239-42, 250.

¹⁶⁶ See *id.* at 256. Initially, the Institute was financed by private funds, but in recent years the Ministry of Justice added it to its budget; it is about to receive a status of an independent unit within the Ministry of Justice. See OR COMMISSION REPORT, *supra* note 108, at 115.

¹⁶⁷ See Ben-Dror, *supra* note 160, at 256-60.

¹⁶⁸ The Or Commission commented in its report with regard to the Institute that “it is impossible any more to imagine the judiciary without it.” OR COMMISSION REPORT, *supra* note 108, at 115.

¹⁶⁹ The course was introduced at Tel-Aviv University Law School, Haifa University Law

leading Israeli school of law—Tel-Aviv University—opened a new masters program in Judicature Studies, in which law students, instructed by judges, prepare themselves for judicial offices.¹⁷⁰

Ben-Dror summarized in his article the development of professional training for judges in Israel:

It seems to me . . . that in the realm of training judges for judicial offices, the Israeli legal system is taking its own independent path. On the one hand, we are distancing further and further away from the English model according to which it is sufficient that the candidate for judicial office is a successful practitioner. On the other hand, we are coming closer to the idea—which several countries in the Continent implement devoutly—that a special training is required prior to the appointment to judicial office.¹⁷¹

In sum, since the mid-1980s judging has been increasingly recognized by judges, as well as by some segments of the legal academia, as a distinct profession that requires additional if not separate training. The next step in the project will be gaining complete control over the production of producers through the establishment of an independent education system for judicial candidates.¹⁷²

Control over the training process is, however, only half way to a monopoly over the production of professional producers. Control over education, important as it might be, is useless if the profession's gates are breached. In order to gain full monopoly, the judiciary has to assume control over entry into the profession and to prevent lateral entry. Control over education, coupled with entry control, secures the control of the profession over the production of its professional producers. Lateral entry by lawyers is, for obvious reasons, particularly harmful to the professional project of the judiciary. Hence, the shift in judicial career pattern plays an important role in this project.

b. Control of Entry—Shift in Judicial Career Pattern

The transformation in the judicial career patterns is another quintessential indication of the growing control of the judiciary over the production of producers and the increasing exclusion of lawyers. In the

School, and the College for Administration Law School. See Ben-Dror, *supra* note 160, at 260.

¹⁷⁰ *Id.* at 260 n.74. I do not, however, have any data that either confirms or refutes the usefulness of this program for lawyers who wanted to become judges.

¹⁷¹ *Id.* at 260.

¹⁷² According to Judge Ben-Dror, this is indeed the next step. See *id.* at 253, 261 (“In our country there is (*still*) no institutionalized education—academic or otherwise—oriented to judicial office We do not object to a suitable training in the field of judging as a supplement to law school education.”) (emphasis in original).

first years of statehood, appointment of magistrates' and district court judges was the prerogative of the Minister of Justice.¹⁷³ Supreme Court Justices were appointed by the Interim Government and subsequently by the Israeli government.¹⁷⁴ The Interim Government introduced a custom according to which all appointments were submitted as a draft-law for the approval of the Provisional Council of State, later replaced by the Israeli Parliament (*Knesset*). This custom was followed until the enactment of the Judges Law in 1953.¹⁷⁵ Since then, the task of judicial appointment has been entrusted to a Selection Committee¹⁷⁶ with nine members. The Committee's members are the Minister of Justice (chair), an additional Minister selected by the government, the Chief Justice of the Supreme Court and two other Justices, two practicing lawyers elected by the Bar, and two *Knesset* Members. In practice, however, the Selection Committee is dominated by the three Supreme Court Justices, who approve of all the new appointments.¹⁷⁷

As described at length above,¹⁷⁸ in the early years of the Israeli state the vast majority of appointments to all judicial instances came from the lawyers' ranks. Lawyers were regularly appointed to serve as district court judges and sometimes even as Supreme Court Justices. Appointment of lawyers to the Supreme Court ceased as early as 1954 and, save a single exception,¹⁷⁹ no practicing lawyer has been appointed to the Supreme Court thereafter.¹⁸⁰ This is not at all the case with district court judges.

Until the early 1980s, respectable members of the Bar were frequently appointed to the district court. A possible career pattern for lawyers was to practice law for two or three decades, acquiring status and prestige within

¹⁷³ See Law and Administration Ordinance, 1948, 1 L.S.I. 7 (1948) § 14(a). See also RUBINSTEIN, *supra* note 35, at 55.

¹⁷⁴ See *id.* at 57-58.

¹⁷⁵ Judges Law, 1953, 7 L.S.I. 124 (1953).

¹⁷⁶ *Id.* The name of the committee was changed in 1984 from the "Appointment Committee" to the "Selection Committee."

¹⁷⁷ See EDELMAN, *supra* note 69, at 34. See also Mordechai Haller, *The Court that Packed Itself*, 8 AZURE (1999), available at <http://www.shalem.org.il/azure/8-haller.html> (last visited May 15, 2001). The reason for the domination is that the political branch (the government members and the *Knesset* members) defers to the decision of the Supreme Court Justices. This deep-rooted custom (that makes the Selection Committee, to a great extent, a rubber stamp of the Justices' choice) might account for the lack of visible initiatives to transfer the selection process to the hands of the judiciary or to change the composition of the Selection Committee.

¹⁷⁸ See *supra* notes 48-49 and accompanying text.

¹⁷⁹ Dr. Mishael Heshin, the son of S. Z. Heshin, a former Supreme Court Justice, was appointed to the Supreme Court in 1992, after practicing law for several years. Dr. Heshin served for many years in the Ministry of Justice before opening a private practice. In his last post with the Ministry of Justice he served as the Deputy Attorney General.

¹⁸⁰ EDELMAN, *supra* note 69, at 35. See also RUBINSTEIN, *supra* note 35, at 139.

the profession, and then seek appointment to the district court. Moving between the different branches of the legal profession was an acceptable, and even encouraged, career path.¹⁸¹ During the 1980s, however, with the advent of the professional project this practice gradually diminished, and had reached near extinction in the 1990s. Although appointment to all judicial instances is, in theory, still open to practicing lawyers, in practice this career path is blocked. District court offices are reserved for presiding judges,¹⁸² and the only judicial instance that is open to practicing lawyers is the magistrates' court. Even at the lowest judicial level there is a clear tendency to favor lawyers from the public sector, especially prosecutors.¹⁸³ If a lawyer wants to embark on a judicial career, the chances are she will have to begin at the bottom of the pyramid, and thus will be forced to decide on a judicial career in a relatively early stage of her professional life. This tendency is strongly encouraged by the judiciary; it has appointed, in recent years, a number of young lawyers to judicial offices.¹⁸⁴ As a result, judgeship is becoming an alternative career path to practicing law. Judges are appointed at a younger age to the lowest instance in a pyramid-like judicial structure, and graduating law students must make fairly irrevocable career choices in an early stage of their professional life.

In 1997, the Commission for Examination of the Structure of the Ordinary Courts in Israel, chaired by Justice Theodore Or, submitted its report to the Minister of Justice after several years of deliberation.¹⁸⁵ The report proposes a sweeping reform in the structure of the Israeli court

¹⁸¹ This is also the case in the United States where "lawyers move between categories throughout their professional lives." ABEL, *AMERICAN LAWYERS*, *supra* note 8, at 166.

¹⁸² This is expressed in the Or Commission Report from 1997 affirming that "the Magistrate Courts constitute the natural resource from which the District Court judges evolve." *See* OR COMMISSION REPORT, *supra* note 108, at 26.

¹⁸³ An interesting by-product of the professional project is the feminization of the judicial profession. Since many judicial appointments are made from the prosecutor's office and large number of the employees in the prosecutor's office are women, many judges appointed during the 1980s and the 1990s were women.

¹⁸⁴ *See, e.g.*, Israel Makluf, *Judges, Listen to the Lawyers!*, *THE LAWYER*, May 1996, at 6 [hereinafter Makluf, *Judges, Listen to the Lawyers!*] ("According to declared policy young judges are appointed to the Magistrates Courts."). *See also* Victor Hertzberg et al., "I Talked About Constitutional Revolution in Order to Attract Attention" (*An Interview with Chief Justice Aharon Barak*), *THE LAWYER*, May 1996, at 12 [hereinafter Hertzberg et al., "I Talked About Constitutional Revolution"]. Chief Justice Barak stated that:

I know that recent appointments of several very young judges evoked criticism. I do not think, however, that the age matters. What matters is maturity Such a process is almost impossible in other legal systems, in which judicial appointment is done according to seniority or through elections *In our case there is a possibility to promote young and talented people who will dedicate themselves to judging.*

Id. (emphasis added).

¹⁸⁵ *See* OR COMMISSION REPORT, *supra* note 108.

system. The reform proposal, if accepted by the government, would significantly increase the tendency of transforming judgeship into an alternative career pattern. Under the existing system, jurisdiction is divided between the magistrates' court and the district court according to the severity of the crime in criminal cases or the requested remedy in civil cases.¹⁸⁶ The district court also serves as an appellate court on magistrates' court's decisions.¹⁸⁷ According to the proposed reform, the magistrates' court will be significantly augmented and transformed into the only first judicial instance with an all-encompassing jurisdiction.¹⁸⁸ The district court will be transformed into a Court of Appeal. The *Or Commission Report* recognizes that under the new circumstances the chances of promotion of magistrates' court judges to the district court will decrease substantially,¹⁸⁹ but points to what it considers a great advantage following from the suggested reform—the professionalization of the judiciary.¹⁹⁰

3. Monopoly of Knowledge

The single most important element of the professional project is the production of an exclusive body of knowledge for the profession.¹⁹¹ The centrality of professional knowledge is manifested in the various definitions of the professions. For example, sociologist Keith Macdonald defines the professions as “occupations based on advanced, or complex, or esoteric, or arcane knowledge.”¹⁹² Abbott argues that the professions are “exclusive occupational groups applying somewhat abstract knowledge to particular cases.”¹⁹³ And Larson insists that professionalization is an attempt to translate special knowledge and skills into social and economic rewards.¹⁹⁴ The crucial importance of exclusive professional knowledge lies in its being a key element in legitimating social closure,¹⁹⁵ which in

¹⁸⁶ *Id.* at 24-25.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 25.

¹⁸⁹ *See id.* at 28.

¹⁹⁰ *See id.* The *Report* does not elaborate on the definition of “professionalization.”

¹⁹¹ *See* SHAMIR, *THE COLONIES*, *supra* note 16, at 117. Shamir noted that:

The most crucial element in the professionalization project, at the epistemic level, is the availability of an abstract and theoretical body of knowledge which arguably ensures the reliability and the (at least) quasi-scientific foundation of professional practice. The ability to refer to such a body of knowledge, in fact, is what distinguishes a profession from a craft and allows the construction of professional identity.

Id.

¹⁹² MACDONALD, *supra* note 124, at 1.

¹⁹³ ABBOTT, *supra* note 8, at 8.

¹⁹⁴ *See* LARSON, *supra* note 8, at xvi-xvii.

¹⁹⁵ *See id.* at 51 (“Closure is justified only in terms of the special skills acquired by

turn enables the profession to sustain its jurisdiction.¹⁹⁶ Exclusive knowledge and expertise distinguish members of the profession from lay people as well as from other professions and occupations. Without claiming a unique access to some knowledge, there is no way of cognitively distinguishing one occupational group from another¹⁹⁷ or, in our case, one sub-profession from the rest of the profession.¹⁹⁸

When dealing with the production of exclusive knowledge, however, the judiciary finds itself in a disadvantaged position. As mentioned earlier, judges and lawyers undergo the same formal education and share the same body of knowledge. Thus, judges are trapped in a vicious circle: Without convincing the public and the decision-makers that the judiciary possesses an exclusive body of knowledge, there is no visible necessity for the separate training and education of judges; but a separate institutional education is almost the only way to produce the missing body of knowledge. Judges, then, must produce professional knowledge that would distinguish them from lawyers, and in the absence of separate education, this knowledge has to be produced on the job. The issue is more complicated given the special characteristics of the body of legal knowledge. Legal knowledge, by its nature, is produced not only in academic institutions but also as a result of practice,¹⁹⁹ and the role of the judiciary is to produce legal knowledge through its decisions and precedents for the service of the legal profession as a whole. Thus, the opportunities of the judiciary to produce an exclusive knowledge are even more limited. The knowledge that can be produced in such circumstances is much more diffuse than that produced through institutionalized

professional producers who have been freely admitted to training and judged by universalistic criteria.”).

¹⁹⁶ See ABBOTT, *supra* note 8, at 53-54. Abbott noted that:

The ability of a profession to sustain its jurisdictions lies partly in the power and prestige of its academic knowledge. This prestige reflects the public's mistaken belief that abstract professional knowledge is continuous with practical professional knowledge, and hence that prestigious abstract knowledge implies effective professional work. In fact, the true use of academic professional knowledge is less practical than symbolic. Academic knowledge legitimizes professional work by clarifying its foundations and tracing them to major cultural values.

Id.

¹⁹⁷ See FREIDSON, PROFESSIONALISM REBORN, *supra* note 14, at 7 (claiming that “[w]hat distinguishes occupations from each other is the specialized knowledge and skill required to perform different tasks in the division of labor”).

¹⁹⁸ For this reason, Ben-Dror stubbornly argues that the craft of judging is based on completely different premises than that of legal practice. See Ben-Dror, *supra* note 160 and accompanying text.

¹⁹⁹ LARSON, *supra* note 8, at 175. Larson compares the legal body of knowledge to that of the medical profession in which knowledge is produced mostly in research laboratories and not in the workplace. *Id.*

education. In what follows, this article will briefly explore three sites at which the judiciary, despite the various difficulties, manages to produce an exclusive professional knowledge.

a. The Reasonableness Discourse

One site at which exclusive knowledge is produced was exposed by Ronen Shamir in his article *The Politics of Reasonableness: Reasonableness and Judicial Power at Israel's Supreme Court*.²⁰⁰ The main thesis of Shamir's article is that the Court uses the notion of reasonableness as a domain of exclusive expertise:

The argument according to which the increasing involvement of the Supreme Court [in the political sphere] is designed to protect the rule of law should be replaced with the claim that the idea of protecting the rule of law is part of the rhetorical reservoir that the court uses in order to establish the legitimacy of the reliance on the discretion of the "professional" judge.²⁰¹

According to Shamir, the doctrine of reasonableness assists the judges in their claim to a possession of esoteric legal tools with which they, and only they, can conceptualize social reality and convert it into "legal reality." The Court, claims Shamir, insists on reasonableness as a legal requirement and at the same time insists that the judge is the only agent who has the ability to apply it.²⁰² In other words, the Court employs the doctrine of reasonableness as a professional resource of exclusive expertise. Shamir locates the origins of the reasonableness discourse at the end of the 1970s with its culmination in the 1980s.²⁰³

b. Judicial Discretion

A second important source of professional knowledge is found in the academic writings of Chief Justice Aharon Barak. Chief Justice Barak's writings—starting with his book *Judicial Discretion*²⁰⁴ in 1987 and followed by the voluminous trilogy *Interpretation in Law*²⁰⁵ published throughout the 1990s—can be seen as a continuous project of producing

²⁰⁰ Shamir, *The Politics of Reasonableness*, *supra* note 98, at 5.

²⁰¹ *Id.* at 7.

²⁰² *Id.* at 12.

²⁰³ *Id.* at 10.

²⁰⁴ AHARON BARAK, JUDICIAL DISCRETION (1989) [hereinafter BARAK, JUDICIAL DISCRETION].

²⁰⁵ AHARON BARAK, PARSHANUT BAMISHPAT [INTERPRETATION IN LAW] (1992); AHARON BARAK, PARSHANUT BAMISHPAT: PARSHANUT HUKATIT [INTERPRETATION IN LAW: CONSTITUTIONAL INTERPRETATION] (1993); AHARON BARAK, PARSHANUT BAMISHPAT: PARSHANUT BAMISHPAT HAPRATI [INTERPRETATION IN LAW: INTERPRETATION IN PRIVATE LAW] (1994).

professional knowledge for the judiciary. In his books, Chief Justice Barak attempts to transform “judicial discretion” from a sort of know-how into a scientific knowledge that should be studied and taught.²⁰⁶

Chief Justice Barak opened *Judicial Discretion* by presenting himself as a pioneer in the study of a hitherto neglected and mystified scholarly field: judicial discretion. “Judicial discretion,” he wrote, “is, for the most part, a mystery—to the general public, to the community of lawyers, to teachers of law, and to judges themselves.”²⁰⁷ Chief Justice Barak insists that judicial discretion should be approached “scientifically” and not as a “subjective affair”;²⁰⁸ the definition he provides for judicial discretion follows logically from this understanding. Judicial discretion, according to Chief Justice Barak, is “the power given to a person with authority to choose between two or more alternatives, *when each of the alternatives is lawful*.”²⁰⁹ This definition serves the purpose of excluding lawyers. It prevents judicial discretion from being a part of jurisprudence, since the different alternatives the judge faces when applying judicial discretion are all *legally* correct. Hence, judicial discretion is not something that can be included within the “legal body of knowledge” studied at law schools. It is something different: An exclusive knowledge controlled by the judiciary. “I am not a philosopher,” concluded the Chief Justice; “[m]y field of specialization is not jurisprudence. I am a judge. My field is the doctrine of adjudication. Jurisprudence—the doctrine of law—and the doctrine of adjudication are two different things.”²¹⁰

c. Judicial Disqualification

A third site for producing exclusive knowledge is judicial disqualification.²¹¹ This is important by virtue of its uniqueness within the

²⁰⁶ Cf. Abel, *Theories of the Legal Profession*, *supra* note 83, at 117 (arguing that contemporary professions have to present their expertise as objective and not arbitrary or idiosyncratic and “the most powerful assurance of objectivity is identification with the natural sciences”). Chief Justice Barak’s project of transforming judicial discretion into a “science” has a structure similar to that of Christopher Columbus Langdell, the dean of Harvard Law School in the late nineteenth century, who developed a scientific approach to law. In order to achieve his goal, Langdell tripled the time of legal training at Harvard Law School from one to three years and introduced the case method as the only way to teach the new “science.” As a result, rather than a craft acquired through apprenticeship, law became an abstract scientific body of knowledge that is researched and learned in academic institutions. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 612-20 (1985). See also Grey, *supra* note 30, at 1-2.

²⁰⁷ BARAK, *JUDICIAL DISCRETION*, *supra* note 204, at 3.

²⁰⁸ *Id.* at 4.

²⁰⁹ *Id.* at 7 (emphasis added).

²¹⁰ *Id.* at x-xi.

²¹¹ Judicial disqualification, also called recusal, is a procedure by which the parties can ask the judge to disqualify herself due to partiality.

legal discourse. The legal discourse tends to erase the judge from the text. The judge's role is to reveal the law; judges are the carriers of legal knowledge, and as such their personal characteristics are considered irrelevant. According to the rules of the legal field, truth claims that are produced and distributed are comprehensible without reference to the "author" of the legal texts. It does not matter whether the judge is a man or a woman,²¹² an Arab or a Jew,²¹³ religious or atheist. The judge as a human being with a specific biography and history is erased from the text.

Through judicial disqualification, however, judges are incarnated as individual humans. The court must refer explicitly to everything that is usually left outside the legitimate discourse. Judges must explain what circumstances prevent them from judging objectively and impartially and thus are compelled to explicitly specify their skills. Hence the importance of judicial disqualification to this project; it is an ideal site for producing professional knowledge and expertise. This article will now address the specific ways in which judges go about constructing their unique expertise through judicial disqualification.

A puzzling phenomenon, found in many disqualification cases since the mid-1980s, is the distinction made between the "appearance of justice" and the "doing of justice." This phenomenon stands in striking opposition to the prevalent tendency throughout the legal discourse seeking to maintain a close relation between the "appearance of justice" and the "reality of justice" as a way to preserve the legitimacy of the judiciary.²¹⁴

²¹² In a recent interview Justice Tova Shtrasberg-Cohen, one of the three women on the Israeli Supreme Court, referred to her identity as a female Justice: "The fact that I am a woman has not the least affected my work as a judge When I interpret the law, it has nothing to do with my being a woman My tools of analysis are not those of a woman; they are tools of logic." Ziv, *Human Rights*, *supra* note 18, at 75 n.127.

²¹³ See, e.g., H.C. 2148/94, Amnon Gelbart v. Honorable Meir Shamgar, Chief Justice, 48(3) P.D. 573. The decision approvingly quotes Judge Zuabi, an Arab District Court judge, as having said the following:

A week ago in a hotel, a group of religious youths, five boys and five girls, approached me while I was eating and wanted to ask me a question. I agreed. They wanted to know if I am not objective because I am an Arab. I told them that when I am sitting on a judicial committee I forget that I am an Arab and only try to find the truth

Id. at 582.

²¹⁴ See, e.g., H.C. 732/84, 327/85, MK Yair Tsaban v. Minister of Religion, 40(4) P.D. 141, 150. The Court stated that:

The public's confidence is examined by the judge according to objective criteria. It is not enough that the judge himself is convinced that he fulfilled his duty independently and impartially. He must be convinced that independence, decency and impartiality are also seen by the public. Fairness must not only be done but also appear to be done. Insofar as public trust is concerned, whatever does not appear to be done, is not done.

Id.

The dichotomy between the reality of justice and the appearance of justice has appeared in a large number of judicial disqualification cases since the mid-1980s.²¹⁵ One representative example is the 1988 criminal case of *Brown v. State of Israel*.²¹⁶ In this case, the judge instructed the courtroom guards to arrest the defendant's counsel for contempt.²¹⁷ The defendant refused to continue the trial without his defense attorney and when the judge rejected his plea for a continuance, he made loud remarks interrupting the trial.²¹⁸ The judge instructed the guards to keep the defendant in the courtroom and if he continued to interrupt, to shut his mouth with a handkerchief—violently if necessary.²¹⁹ In the following court session the defendant pleaded for disqualification.²²⁰ The judge refused to disqualify himself, and the case was appealed to the Supreme Court.²²¹ Justice Zamir, who delivered the decision of the Court, dismissed the case, asserting that there were no “objective grounds” pointing to the partiality of the judge.²²² Sensitive to the public image of such a decision, Justice Zamir commented: “The question is not what impression is created in the public or what is the reaction of the reasonable person The only question is what is the opinion of the judge who hears the plea for disqualification.”²²³ “Usually,” he continued, “decisions made by the judge concerning the management of the trial do not indicate prejudice Even if those decisions damage the appearance of justice . . . the appearance of justice should not be preferred to the doing of justice.”²²⁴

How can we account for the explicit dissociation of the traditionally paired notions of the reality of justice and the appearance of justice? This practice can be understood if we see it as part of the professional project of

²¹⁵ See, e.g., C.A. 5398/94, *Nakash v. Official Receiver*, Takdin-Elyon 94(4), 194; H.C. 2148/94, *Gelbart v. Honorable Meir Shamgar*, Chief Justice, 48(3) P.D. 573; Cr.A. 1179/94, *Ashkenazi v. State of Israel*, 48(5) P.D. 320; Cr.A. 2/95, *State of Israel v. Zinati*, 49(1) P.D. 39; Cr.A. 1748/93, *Swisa v. State of Israel*, Takdin-Elyon 93(2) 1352; Cr.A. 1534/92, *Gilboa v. State of Israel*, 46(2) P.D. 637; Cr.A. 2099/91, *Kennedy v. State of Israel*, Takdin-Elyon 91(2), 2522; Cr.A. 2099/91, *Kennedy v. State of Israel*, Takdin-Elyon 91(2), 2522; Cr.A. 699/86, *Avraham v. State of Israel*, 41(1) P.D. 126.

²¹⁶ Cr.A. 1988/94, *Brown v. State of Israel*, 48(5) P.D. 608.

²¹⁷ *Id.* at 612.

²¹⁸ *Id.* at 613.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Brown*, 48(5) P.D. at 614.

²²³ *Id.*

²²⁴ *Id.* at 619. In other cases, the Supreme Court, using a similar rationale, declined to disqualify a judge who referred to the defendant as “this psychopath.” See Cr.A. 732/86, *Haliwa v. State of Israel*, 41(1) P.D. 412, 414. Further, a judge refused to set an early date for a murder trial, commenting “there are other murderers that await trial.” See Cr.A. 2099/91, *Kennedy v. State of Israel*, Takdin-Elyon 91(2), 2522, 2523.

the judiciary. As discussed earlier, professions derive their special status from convincing the public, and subsequently the decision-makers, that they possess an esoteric body of knowledge and exclusive skills, which are “linked to central needs and values of the social system.”²²⁵ In other words, “professions characteristically justify their special status by claiming ‘cognitive exclusiveness,’ a unique access to some expertise that is deemed crucial to the well being of society.”²²⁶ Judicial disqualification serves the professional project precisely in this sense. Through judicial disqualification, the judges produce a dichotomy between the popular understanding of justice (i.e. the “appearance of justice”) and “justice” itself, which is known only to professional judges. The ability to behold the reality of justice and hence also to do justice is the expertise of the judges, and anyone outside the judiciary is left with a mere appearance of justice. Thus, judicial disqualification enables judges to construct a new expertise and at the same time appropriate it, presenting themselves as its sole owners.²²⁷ The court makes sure that the content of the new expertise and the specific manner in which it is acquired are kept absolutely mystical so they can be neither understood nor imitated by outsiders.²²⁸ At the same time, it is important for the courts to bestow an image of science on the

²²⁵ LARSON, *supra* note 8, at x.

²²⁶ Stanley Fish, *Anti-Professionalism*, 7 CARDOZO L. REV. 645, 646 (1986).

²²⁷ An alternative explanation accounting for this practice could be a massive increase in the number of disqualification pleas in the years preceding it (i.e. late 1970s and early 1980s) and the desire of the courts to stop the flow of pleas for disqualification. Due to a lack of statistical data on the number of disqualification pleas filed with the courts before the late 1980s, it is hard to disprove this hypothesis. I do not think, however, that it is a valid assumption. According to the data, there was no decrease in the number of disqualification pleas appealed to the Supreme Court since 1986, with the introduction of the new tests for disqualification. If anything, there was during the 1990s an increase in the number of disqualification pleas appealed to the Supreme Court. Thus, the alternative explanation is unlikely. Moreover, even if the increase, real or imaginary, in disqualification pleas is part of the reason for the new practice, it does not necessarily exclude my explanation. The specific way in which the courts chose to handle the situation might unconsciously stem from the professional project, even if the acknowledged objective is different.

²²⁸ For a discussion of the notion of “mystification,” see Richard A. Posner, *Professionalisms*, 40 ARIZ. L. REV. 1, 3 (1998). Posner argued that:

I shall call the case in which belief in a profession’s knowledge claims is not justified by the profession’s actual knowledge the case of ‘professional mystique.’ The greater that mystique, the more secure the profession’s claim is to the privileges of professional status. A profession whose knowledge claims are inherently shaky has a particularly urgent interest in preserving its mystique

Id. For the Israeli judiciary, this mystique is of high importance, since the judges do not yet have a separate formal education and hence their esoteric knowledge or expertise, which is acquired on the job, is very unstable and must be constantly maintained.

new professional knowledge; this is done by the insistence on the "objectivity" of the disqualification tests.²²⁹

The attempt of the judges to appropriate "justice" as a professional expertise inevitably affects the lawyers in a fundamental way. The appeal to "justice" has traditionally been the source of legitimization for the legal profession as a whole.²³⁰ Lawyers have justified their exclusive rights and professional status by asserting their role in promoting justice and legality.²³¹ Appropriation of justice by the judiciary undermines the lawyers' basis of legitimization. This article will now consider the reaction of the lawyers to the professional project.

²²⁹ See Meir Shamgar, *Al Paslut Shofet-Beikvot Yadid Tartei Mashma* [On Judicial Disqualification—Following Yadid in Both its Meanings], in GVUROT LE-SHIMON AGRANAT 87, 107 (Aharon Barak et al. eds., 1986) ("The real likelihood [of partiality] test is designed to reach a decision on the basis of the facts as they actually are, as distinct from the impression of the outside observer. In order to formulate this test the *objective standard of the Court* is adopted" (emphasis added)). There is an apparent tension between the need to mystify the professional knowledge on the one hand and the necessity to present it as a scientific body of knowledge on the other hand. This tension emanates, according to Abel, from the irreducible element of uncertainty or discretion that professional services contain. It is "a delicate balance between indetermination and technicality, art and science. Too much art and consumers lose confidence (as in quack medicine or investment advice); too much science and consumers can provide the service themselves or resort to nonprofessional advisers." Abel, *Theories of the Legal Profession*, *supra* note 83, at 117. This tension can account for the apparent contradiction in Chief Justice Barak's formulation of "judicial discretion." As we have seen above, the Chief Justice goes to great pains trying to present "judicial discretion" as a science. But at the same time he also mystifies it: "Judicial discretion is, for the most part, a mystery—to the general public, to the community of lawyers, to teachers of law, and to judges themselves." BARAK, JUDICIAL DISCRETION, *supra* note 204, at 3.

²³⁰ Cf. Rhode, *supra* note 138, at 693 (arguing that part of the reason for the promulgation of the ABA ethical rules lay in the desire of its leaders to "establish attorneys as 'high priests of justice . . . robed in priestly garments of truth, honor, integrity'").

²³¹ See Ziv, Human Rights, *supra* note 18, at 36. See also Abel, *Theories of the Legal Profession*, *supra* note 83, at 117. Abel stated that:

The success of producers in constructing a market for their services turns on several variables. What consumers 'need' is a function of cultural beliefs, over which producers have limited influence. All they can do is amplify or dampen demand by connecting their services to fundamental values: religion with transcendental beliefs, medicine with physical well-being, and law with justice.

Id.

III. "JUDGES, LISTEN TO LAWYERS!": LAWYERS' OPPOSITION TO THE PROFESSIONAL PROJECT

The main source of opposition to the professional project is, naturally, its target group—the practicing lawyers.²³² Before embarking on a discussion of the content of their opposition, I must refer first to the striking dilemma lawyers confront when faced with the exclusionary strategies of the judiciary.

Earlier, this article discussed the inherent dialectic that informs the attitude of the courts toward the lawyers, which stems from the shared stake of both lawyers and judges in preserving and promoting the eminent status of the "rule of law."²³³ A greater dialectic exists in the inverse attitude of lawyers toward judges. Lawyers are faced not only with the shared interests that bind together the legal profession, but they also rely on the judiciary as a primary source of status and reputation. A loss of connection to the bench directly affects the lawyer's status and legitimacy. The Bar needs the affiliation with the exemplary and elevated judiciary to sustain its own status. This is so precisely because the lawyers left the moral arena to the judiciary. Judgeship enables the lawyers to engage in market monopoly and at the same time lay claim to a representation of eminent values as "officers of the court." Lawyers also need the judiciary for its special relationship with the state.²³⁴ This dialectical situation can account for the lawyers' tango dance in their relation to the bench and the grave internal rift within the Bar as to the proper attitude that should be adopted toward the judiciary.

²³² It is important not to confuse two analytically different concepts: one is the "target group" of the professional project and the other is its "audience." The notion of "target group" refers to the following questions: Against whom does the occupational group initiate the professional project? From whom does the occupational group particularly want to distinguish itself? The professional project is always aimed at detaching the occupational group from the public at large. However, usually it also has a specific target group from which it is particularly important to distinguish itself. The possible target groups are, naturally, unlimited. Thus, for instance, the target group of a professional project of medical doctors could be the nurses and paramedic occupations. The professional project of the judiciary is aimed primarily at the legal profession. The "audience" of the professional project, on the other hand, is a different concept. The question here is who the audience of the occupational group's claim to jurisdiction is. The most obvious audiences of such jurisdictional claims are the public and state officials, since if an occupational group wishes to achieve recognition as a "profession," it must convince both the public and the state of its necessity. In certain cases the target group and the audience of the professional project might overlap. See ABBOTT, *supra* note 8, at 59-69 (referring to what I have called the "audience" as "arenas of jurisdictional claims").

²³³ See *supra* text accompanying notes 118-20.

²³⁴ Cf. Botein, *supra* note 65, at 49.

A. "*Chronicle of a Crisis Foretold*":²³⁵ *The Reaction of the Bar to the Professional Project*

The first serious reaction of the Bar to its exclusion by the judiciary occurred in 1992. That year, the chairman of the Israeli Bar Association, Dror Hoter-Ishai, initiated for the first time an outspoken criticism of the judiciary. He accused the judicial system of corruption and claimed a conspiracy existed among judges to appoint their close friends as receivers. In a response, the Chief Justice took the extreme measure of writing a strongly-worded letter denying the accusations.²³⁶ To be sure, articles by individual lawyers criticizing particular judges or specific judicial practices were published from time to time since the early years of statehood. The novelty of the 1992 incident was that for the first time the organized Bar, represented by its chairman, spoke out publicly against the judiciary. Since 1992, the tension between the Bar and the bench became increasingly more acute, and it was only a matter of time until the next eruption. And indeed it came.

In the second half of 1996, the Supreme Court, sitting as the High Court of Justice, promulgated two landmark decisions affecting the Bar. Both involved important elements of securing the professional integrity of the Bar—control over entry and constraint of competition within the profession—to the detriment of the Bar.

The first decision, delivered in June 1996, invalidated a decision of the Bar to raise the grade needed for passing the Bar exam.²³⁷ As a result of a large increase in the number of law school graduates during the 1990s, the Bar amended its exam regulations²³⁸ raising the pass grade of the Bar exam from sixty to seventy and adding an additional "practical" exam to the existing curriculum. The reasons provided by the Bar for its actions were the increasing erosion in the quality of young lawyers and the obligation of the Bar as a public fiduciary to maintain an appropriate standard of legal services. The Supreme Court invalidated the Bar's amendment, implying disbelief of the Bar's "public good" and "quality consideration" arguments. "What can justify an instantaneous implementation of the Bar's decision to add study-material to the Bar exam?" wondered the Justices.²³⁹ They immediately provided the answer:

²³⁵ The title is borrowed from GABRIEL GARCIA MARQUEZ, *CRONICA DE UNA MUERTE ANUNCIADA* [CHRONICLE OF A DEATH FORETOLD] (1999).

²³⁶ See Shkhory & Alon, *supra* note 4. See also SHETREET, *supra* note 4, at 303.

²³⁷ H.C. 2832/96, Yosef Banay v. Nat'l Council of the Bar Ass'n, 50(2) P.D. 582.

²³⁸ Rules of the Bar Association (curriculum of exams in Israeli law and in practical subjects), 1962, K.T. 1395, 704.

²³⁹ *Banay*, 50(2) P.D. at 595.

The one and only reason is that an immediate implementation might prevent an unknown number of examinees from [passing the exam and] being licensed as lawyers A dissonant noise comes up from the argument that there is an urgent need to examine the law-interns in drafting legal documents without even providing them with the opportunity to learn this craft.²⁴⁰

The Justices also remarked that the Bar's argument, that the necessity to maintain the high standard of the profession in the face of increasing erosion in the quality of examinees justified its decision, "seems dubious and in any case very weak."²⁴¹

The second slap in the Bar's face came a few months later. In October 1996, the High Court of Justice invalidated Rule 27 of the Bar's Ethics Rules.²⁴² Rule 27 dealt with the transfer of a case from one lawyer to another.²⁴³ According to this rule, such a transfer required the consent of the former lawyer—consent that had to be granted unless the lawyer had a fee dispute with the client.²⁴⁴ In case of a fee dispute the client was obliged to agree to arbitration conducted by the Bar.²⁴⁵ In addition, the client had to deposit a sum of money to guarantee payment to the lawyer pending the Bar's decision in the arbitration.²⁴⁶ In its decision to abolish Rule 27, the High Court of Justice asserted that Rule 27 imposes an unreasonable burden on the client's individual right to choose her own lawyer and therefore was void.²⁴⁷

A month later, in November 1996, the chairman of the Bar was interviewed by the conservative ultra-orthodox newspaper *Yated-Ne'eman*.²⁴⁸ The interview was an all-out declaration of war against the

²⁴⁰ *Id.*

²⁴¹ *Id.* at 596.

²⁴² See H.C. 4330/93, *Ganem v. Israeli Bar Ass'n*, 50(4) P.D. 226.

²⁴³ Rules of the Bar Association (Professional Ethics), 1986, K.T. 4965, 1373.

²⁴⁴ *Id.* at 1377.

²⁴⁵ *Id.*

²⁴⁶ *Id.* Rule 27 is a crucial element of the professional project. As much as the profession wants to guard its boundaries from outside competition, it also must set limits on competition within the profession. See Lewis, *Introduction*, *supra* note 10, at 1.

²⁴⁷ See *Ganem*, 50(4) P.D. at 238, 238. For the lawyers' criticism of the Court's decision, see Ilan Bombach, *Requiem to Rule 27*, *THE ROBE*, Nov. 1996, at 8. The author argues that Rule 27 was an important tool for integrating the profession and securing its subsistence, and suggests bypassing the decision by including a provision modeled on Rule 27 in the private contract between lawyers and their clients.

²⁴⁸ The forum in which Hoter-Ishai chose to present his criticism is in itself interesting. *Yated Ne'eman* is owned and controlled by members of one of the most extreme ultra-orthodox groups in Israel. This group ideologically opposes the secular court system and particularly the Supreme Court, which represents secular liberal values. The fact that Hoter-Ishai voiced his criticism in this medium points not only to a rupture between the judiciary and the Bar—a rupture that will be discussed at length below—but also to the formation of

judicial system and its leader, the Supreme Court. Hoter-Ishai accused the judges of neglecting their duties, busying themselves with "management of the state" while the judicial system collapsed under the caseload.²⁴⁹ The Supreme Court, he argued, should not be "super-legislator" or "super-managing-director" of the state but instead should "mind its own business."²⁵⁰ Hoter-Ishai also asserted that he and his fellow lawyers had warned repeatedly that the judicial system did not function properly and generated injustices. He claimed that there were voices within the Bar Association that suggested going on a strike and refusing to appear before the Supreme Court. "Neither law nor justice can be found in the High Court of Justice," he concluded, and he called for its outright abolition.²⁵¹ Hoter-Ishai's vehement attack targeted not only the judicial system but also individual judges. He accused the Supreme Court Justices of corrupting the justice system by giving lectures in private law schools and publishing high-priced books instead of handling their cases.²⁵²

Beneath the blunt rhetoric (which prevented any serious public discussion of the criticism) Hoter-Ishai was attacking crucial elements of the professional project. His call to eradicate the High Court of Justice is, paradoxically, a desperate attempt to reunify and integrate the legal profession. The High Court of Justice is a primary source of the judiciary's ability to distance itself from the Bar. Through this institution the Supreme Court exerts its normative power and gains moral authority that is reflected, in turn, on the judiciary as a whole.²⁵³ Hoter-Ishai urged the judges to

an odd coalition between the Bar and the extremist ultra-orthodox community, although the only thing that ties them together is a fierce opposition to the Supreme Court.

²⁴⁹ See Ilan & Tsitrin, "What is Happening in the High Court of Justice is Outrageous," *supra* note 3, at A1, A12.

²⁵⁰ *Id.*

²⁵¹ *Id.* See also Ilan, *Hoter-Ishai Calls to Abolish the High Court*, *supra* note 3, at A8.

²⁵² Shahar Ilan, *Hoter-Ishai: Theoretical Calculation Shows that Justice Barak Earned 10 Million Shekels from his Books*, HA'ARETZ, Nov. 28, 1996, at A5; Ilan & Alon, "Barak Delayed Decisions," *supra* note 5, at A1.

²⁵³ As noted above, according to a survey conducted in 1991, 71.7% of the Israeli Jewish population consider the High Court of Justice as the institution with the highest moral authority in Israel. See *supra* note 104 and accompanying text. In an article published two years later in *The Chamber*, Hoter-Ishai justified his desire to abolish the High Court of Justice:

I am afraid that the Supreme Court began, when sitting as the High Court of Justice, to 'manage' the state and to involve itself in varied areas that it should not involve itself in. We all know that the High Court of Justice is an archaic remnant of the British Mandate over Palestine, and it does not have any equivalent in any other state. It was introduced during the Mandate era, since the British did not count on the local judges and wanted to leave judicial review of the state's administration at the hands of British judges.

Gideon Alon, "The Judicial System Should Not Represent Itself but Serve the Public": An Interview with the Chairman of the Bar, *THE CHAMBER*, Nov. 1998, at 12 [hereinafter, Alon,

resume their “original” role as providers of “legal services,” a role that binds them to the lawyers.²⁵⁴ Hoter-Ishai’s attack on the scholarly work done by judges can be interpreted as an assault on the production of exclusive professional knowledge. And last but not least, the criticism accusing the judiciary of generating injustice is inextricably connected to the professional project. The ability to both understand and do justice is, as we saw earlier, the linchpin of the professional project and Hoter-Ishai’s criticism was aimed at the heart of this project. The subtext of the criticism is that lawyers share the ability of the judges to perceive the reality of justice.

Following the interview and the decisive refusal of Hoter-Ishai to apologize or retract his statements, Chief Justice Aharon Barak instructed the judges and the judicial administration to cut off any professional relationship with the Bar. Chief Justice Barak prohibited judges from participating in any forum organized by the Bar or cooperating with any of the Bar institutions. The relationship between the Bar and the judiciary had hit rock bottom.²⁵⁵

The media and the public joined the judiciary in condemning the Bar for the “unbridled assault.” In a *Ha’aretz* editorial, the publishers directed the accusations back at the Bar and its chairman.²⁵⁶ The article raised doubts as to the competency of Hoter-Ishai and accused the lawyers of foot-dragging; it ended with a clamor to consider with due seriousness the proposal to abolish the Bar.²⁵⁷

In another article entitled *Officers of the Court*, Ze’ev Segal, a law professor and columnist, put his finger on the serious rift between the Bar and judiciary:

In England judges and lawyers are members of the same Bar Association. *In Israel such partnership does not exist* and the chairman of the Bar, who is supposed to be the defender of the legal system, says

“*The Judicial System Should Not Represent Itself*”].

²⁵⁴ In an article published a year later in the Bar Association’s journal *The Lawyer*, Hoter-Ishai repeated his criticism, arguing that “*instead of providing legal services to the public some segments of the judicial system prefer to sit on Mount Olympus engaging itself in religion and moral issues, management of the state, and guidance of the parliament.*” Dror Hoter-Ishai, *The Legal System Must Change*, *THE LAWYER*, Dec. 1997, at 4 [hereinafter Hoter-Ishai, *The Legal System Must Change*] (emphasis added).

²⁵⁵ The professional relations were partly renewed, several months later, after the heads of the Bar Association districts denounced their chairman’s criticism. See Ben-Zion Tsitritin, *Rift in the Bar Association: The Chairmen of the Bar’s Districts Denounce Hoter-Ishai’s Attacks on Barak*, *HA’ARETZ*, Mar. 5, 1997, at A12 [hereinafter Tsitritin, *Rift in the Bar Association*].

²⁵⁶ Editorial, *An Unbridled Assault*, *HA’ARETZ*, Nov. 28, 1996, at B1 [hereinafter, Editorial, *Unbridled Assault*].

²⁵⁷ *Id.*

in a blunt interview to *Yated Neeman* that “what is occurring today in the Supreme Court is outrageous. Neither law nor justice can be found there.” Against such statements the instruction in the Bar Association Act, requiring lawyers to be loyal not only to their clients but also to “help the court in generating law,” turns pale.²⁵⁸

He also accused the lawyers, instead of the judiciary, of causing the legal system’s ills.²⁵⁹

More interesting for our purposes is the reaction of the lawyers’ community. Hoter-Ishai’s criticism induced an internal rift within the Bar. Individual lawyers organized and published announcements in newspapers supporting the judiciary and condemning the vehement attacks on the judicial authority and its leaders.²⁶⁰ On the day following the publication of Hoter-Ishai’s interview in *Yated Ne’eman*, the chair of the Bar’s district of Jerusalem board, Yossi Shapira, published a denunciation in the Jerusalem district’s journal declaring that it is the duty of the Bar to “demand the satisfaction of the legal system”; he added that it is hard to imagine that Hoter-Ishai’s opinion represents the views of his voters.²⁶¹ Several months later, following the deterioration in the professional relationships between the Bar and the bench, the other three chairpersons of the Bar’s district boards joined Shapira’s denunciation. In a public statement the four chairpersons disapproved of Hoter-Ishai’s criticism.²⁶² This public denouncement was made following an understanding between the district’s chairpersons and the judicial administration according to which the professional relationships between the bench and the Bar districts’ institutions would be restored.²⁶³ In reaction, Hoter-Ishai declared that as the chair of the Bar he represented the opinion of the majority of the lawyers.

It is impossible to know how many lawyers in fact supported Hoter-Ishai’s criticism. Fortunately an objective indicator exists as to the extent of the lawyers’ personal support of Hoter-Ishai, which is linked at least partially to his criticism of the judiciary. In the elections to the Bar chairmanship held in 1995—between his first and second major assaults on the judicial system—Hoter-Ishai was re-elected as chairman of the Bar. In the last elections, held in 1999, Hoter-Ishai was not reelected but managed

²⁵⁸ Ze’ev Segal, *Officers of the Court*, HA’ARETZ, Dec. 1, 1996, at B1.

²⁵⁹ *Id.*

²⁶⁰ See, e.g., *We Are Proud of our Judicial System*, HA’ARETZ, Dec. 3, 1996, at A7. Interestingly, very few of the lawyers who signed the ad are famous. The elite lawyers were conspicuously silent.

²⁶¹ Editorial, *Unbridled Assault*, *supra* note 256.

²⁶² Tsitrin, *Rift in the Bar Association*, *supra* note 255.

²⁶³ *Id.* at A12.

to secure one quarter of the votes.²⁶⁴ Thus, his criticism of the judiciary represented the opinion of a large segment of the Bar members.²⁶⁵

B. Reflection of the Rift in the Bar Journals

The growing rift between the Bar and the bench is manifested in the Bar journals.²⁶⁶ A substantial number of the late 1990s issues are dedicated to criticism of the judiciary and judicial practices that take part in what we have identified as the professional project. The Bar journals became a stage for outspoken critics of the judiciary both from inside and outside the legal community. The bi-monthly column of the chairman in *The Lawyer* was regularly dedicated to criticism of the judicial authority. In his column, Hoter-Ishai repeated time and again his claim that the judges betrayed their genuine role as provider of legal services, engaging instead in "non-judicial" issues.²⁶⁷

The chairman of the Bar was not alone in his criticism and the Bar journals lent voice to other critics. Almost every issue in the late 1990s dedicated several pages to criticism of the judicial authority. The following are representative examples: In an article titled *Judges, Listen to Lawyers*, Israel Makluf, a lawyer, passed harsh criticism on the judiciary.²⁶⁸ He opened by asserting: "Lawyers do not always share the public euphoria around the judicial authority, and it seems sometimes that the high esteem which this authority has acquired is not always accepted by those who have recourse to its services."²⁶⁹ After discussing at length the many defects of

²⁶⁴ The winning candidate received only about five percent more votes than Hoter-Ishai.

²⁶⁵ The membership in the Israeli Bar is mandatory and thus all Israeli lawyers are members of the Bar.

²⁶⁶ The data for this part were gathered from issues of three Israeli Bar journals: *Orech-Ha-Din* [THE LAWYER]—the Israeli Bar Journal; *Haglima* [THE ROBE]—the District of Tel-Aviv journal; and *Halishka* [THE CHAMBER]—the District of Jerusalem journal. I examined issues of the above-mentioned journals since the end of 1996 to date.

²⁶⁷ The following is a short collection: Hoter-Ishai, *The Legal System Must Change*, *supra* note 254, at 4; Dror Hoter-Ishai, *A Bit of Non-Grudging*, THE LAWYER, Sept. 1998, at 8 [hereinafter Hoter-Ishai, *Non-Grudging*] (noting "we do not think that it is the role of the judge to frequently develop new theories"); Alon, "The Judicial System Should Not Represent Itself," *supra* note 253, at 11 ("the judicial system should not represent itself but instead serve the public"). Hoter-Ishai also reminds the readers where his criticism stems from. See Hoter-Ishai, *The Legal System Must Change*, *supra* note 254, at 9 ("It is worthwhile emphasizing that my criticism is designed to improve the functioning of the legal system that we [the lawyers] are an inseparable part of and an important layer in its structure."); Alon, "The Judicial System Should Not Represent Itself," *supra* note 253, at 14-15 (noting "the system is not less important to us than to others and we consider it our duty to point to its illnesses and to offer ways to improve it").

²⁶⁸ Makluf, *Judges, Listen to the Lawyers!*, *supra* note 184, at 6. The article was published in May 1996, a few months before Hoter-Ishai's major attack on the judiciary.

²⁶⁹ *Id.*

the judicial system that harm "the appearance of justice" and engender anger and frustration among lawyers, he concludes his article with an overt threat that expresses the confusing condition in which lawyers found themselves:

Fixing the situation is not at all simple since any criticism is immediately interpreted as an attempt to impair the public trust in the judiciary and, in certain cases, is even defined as 'contempt' of court. Lawyers, who are the first to sense and discern [the harm to the appearance of justice], cannot chop off the branch on which they are sitting. Moreover, even if criticism is announced, nobody listens to it. It seems that the leaders of the Ministry of Justice and the Judicial Authority do not sense the subterranean streams of frustration and resentment among the lawyers, streams that pose great danger if they burst one day. Thus, for instance, the lawyers, each and every one of whom has up his sleeves a story about the wrongs the [judicial] system did to him, can publish them outside the legal system. Thus, for example, determined lawyers and a strong Bar can boycott certain chambers that the appearance of justice abandoned long time ago. Moreover, when the situation becomes unbearable, the lawyers might advise their clients not to file their suits with the court and instead refer them to arbitration procedures that will be held in a strong and serious institution run by the Bar; in which the best legal forces will be joined together. Listen to lawyers.²⁷⁰

Particularly telling is an interview conducted in December 1998 with the *Knesset* Chairman, Dan Tichon. A short time before the interview, Tichon criticized the Supreme Court for its over-involvement in *Knesset* affairs and called for a reassessment of the relationships between the Court and the *Knesset*. This criticism was good enough reason to award him a ticket to the Bar journal. During the interview Tichon repeated his criticism of the Supreme Court for its over-activism, commenting on the inability of Israeli society to openly accept criticism of the Supreme Court, which stems, in his opinion, from the immaturity of the Israeli society.²⁷¹ Having said this, he immediately added the following striking observation: "By the way, this is not the situation among the lawyers. Among lawyers I must tell you it was amazing. The most prominent lawyers called me, and encouraged me and told me you did a great thing saying what you said."²⁷² This phenomenon of lawyers being in the forefront of the opposition to the

²⁷⁰ *Id.* at 8. Two issues that appear in this excerpt should be highlighted. First, protesting the exclusion of lawyers, Makluf emphasizes the important role of lawyers, as the gatekeepers of the justice system, to threaten the judges. Second, Makluf rehabilitates and celebrates the "appearance of justice" that was downplayed by the judiciary.

²⁷¹ Eliezer Pney-Gil et al., *The Supreme Court Took a Foot Out of the Consensus*, THE LAWYER, Dec. 1998, at 16.

²⁷² *Id.*

Court, rightly observed by Tichon, can be understood when conceptualized as a reaction of the Bar to the professional project. This conclusion becomes more evident when examining the specific issues dealt with in the Bar journals. This article will now briefly explore four such issues.

1. Reactions to the *Or Commission Report*

Special treatment was given in the Bar journals to the *Or Commission Report*. The *Report's* recommendations were defined as "dangerous reform"²⁷³ and a "terminal stroke" that would "definitively destroy the already collapsing system."²⁷⁴ The Bar journals lent voice to critics of the Or Commission recommendations, including lawyers, politicians, law professors and judges.²⁷⁵ The criticism focused mainly on the suggestion to reform the structure of the judiciary by turning the magistrates' court into a first instance court and the district court into an appellate court, thus relieving the Supreme Court of its role as the Court of Appeal. This reform was portrayed as a serious danger to the quality of judging, as less experienced judges would deal with more complicated cases.²⁷⁶ Another claim was that the reform was designed to benefit not the consumers of the judicial services, as argued by the Commission, but the judiciary.²⁷⁷ The lawyers presented their criticism as a concern that the proposed reform would distance the judiciary and especially the Supreme Court from the citizens and diminish the "appearance of justice."²⁷⁸ It seems, however, that their disapproval stemmed, at least partially, from the possible effects such a reform would have on the professionalization of the judiciary and its relations with the Bar.

2. Reactions to the Transformations in Judicial Career Pattern

The second issue that attracted ample criticism from the lawyers was the transformation in judicial career patterns. Different columnists condemned the new policy to appoint young judges to the magistrates'

²⁷³ Benjamin Cohen, *Dangerous Revolution*, THE LAWYER, July 1998, at 29 [hereinafter Cohen, *Dangerous Revolution*].

²⁷⁴ Hoter-Ishai, *The Legal System Must Change*, *supra* note 254, at 4.

²⁷⁵ See Cohen, *Dangerous Revolution*, *supra* note 273, at 29-31 (quoting the retired District Judge Benjamin Cohen and Professor Amnon Rubinstein). See also Ruth Gavison et al., *Mr. Chairman, Honorable Knesset, For Your Review*, THE LAWYER, Sept. 1998, at 23-31 (quoting the retired District Court Judge Hanna Avnor, Professor Ruth Gavison, Adv. Pinhas Marinski, MK Dedi Tzucker, the retired Magistrates Court Judge Haim Shapira, the retired District Court Judge Uri Shtruzman, and Adv. Yarum Pestinger).

²⁷⁶ See Hoter-Ishai, *The Legal System Must Change*, *supra* note 254.

²⁷⁷ See Haim Misgav, *Revolution in the Court System—Pros and Cons*, THE ROBE, Oct. 1997, at 5.

²⁷⁸ *Id.* See also Editorial, *Vigorous Objection to the Or Revolution*, THE LAWYER, Dec. 1998, at 11 [hereinafter, Editorial, *Vigorous Objection*].

court as devastating to the legal system. The relatively young age of the new judges, claimed one critic, was not compatible with the life experience, judicial temperament, and legal skills that are necessary for the judicial work.²⁷⁹ Hence, he concluded, the appointment of young judges indicated a preference of efficiency considerations to the "appearance of justice."²⁸⁰ The Bar suggested setting a minimum age limit and requiring extensive professional experience from candidates to judicial office.²⁸¹ This suggestion was clearly designed to turn back time to the days in which judgeship was a career pattern for experienced and respected lawyers and not an alternative career as it became later as a result of the professional project. The suggestion was, of course, rejected by the judicial authority.²⁸²

3. Assimilation Endeavors

Another recurrent theme in the Bar journals was a proposal to let lawyers perform judicial functions. The Bar offered throughout the 1990s to assign experienced lawyers to sit as part-time judges in small claim suits (up to 30,000 Israeli Shekels).²⁸³ The proposal was presented by the Bar as evidence of the "willingness of the lawyers to contribute time and talent for the benefit of the collapsing judicial system."²⁸⁴ It was also described as the "only viable solution."²⁸⁵ The repeated refusal of the judiciary to accept the "generous offer" was rationalized by the Bar as stemming from "conservatism, a dust of vindictiveness or mere bureaucratic arbitrariness" on the part of the judicial system.²⁸⁶ The attempts of the Bar to take part in the judicial praxis can be identified as assimilation efforts that are a well-recognized strategy against exclusionary practices.²⁸⁷ The Bar is structurally subordinated to the judiciary both inside and outside the legal field. In such cases, claims Abbott, the subordinated group will attempt to

²⁷⁹ Makluf, *Judges, Listen to the Lawyers!*, *supra* note 183, at 6.

²⁸⁰ *Id.* See also Dror Hoter-Ishai, *The Bar Chairman's Statement*, THE LAWYER, May 1996, at 2.

²⁸¹ Hoter-Ishai recommended the age of forty as the minimum age for judgeship, in addition to at least twelve years of professional experience in legal practice. See Hoter-Ishai, *The Legal System Must Change*, *supra* note 254, at 4. See also Alon, "The Judicial System Should Not Represent Itself," *supra* note 253, at 12.

²⁸² See Hertzberg et al., "I Talked About Constitutional Revolution," *supra* note 184, at 11.

²⁸³ Thirty thousand Israeli shekels is, as of May 2001, approximately the equivalent of 7,300 U.S. dollars.

²⁸⁴ Dror Hoter-Ishai, *Bar Chairman's Statement*, THE LAWYER, Dec. 1998, at 8.

²⁸⁵ *Id.*; Hoter-Ishai, *The Legal System Must Change*, *supra* note 254, at 4; Hoter-Ishai, *Non-Grudging*, *supra* note 253, at 8; Alon, "The Judicial System Should Not Represent Itself," *supra* note 249, at 17; Editorial, *Vigorous Objection*, *supra* note 274, at 11.

²⁸⁶ Hoter-Ishai, *Non-Grudging*, *supra* note 267, at 8.

²⁸⁷ See ABBOTT, *supra* note 8, at 67-69.

assimilate and imitate the dominant group and present its work and knowledge to the public as identical with those of the dominant group.²⁸⁸

4. Judge-Lawyer Relationships

Assimilation endeavors can account for another salient element of the late 1990s Bar journals: An extensive (one might say obsessive) debate about the judge-lawyer relationship. The late 1990s Bar journals are full of discussions of the relationships between lawyers and judges, what went wrong, and how they can be fixed. As opposed to judges who, as we have seen, highlight their formal and substantive distinction from lawyers, the lawyers emphasize the functions and knowledge both groups share.²⁸⁹ The following is a collection of examples.

In an article titled *Judge-Lawyer, Lawyer-Judge Relationships*,²⁹⁰ the author opened by emphasizing the professional bonds that connect judges and lawyers: "Both judges and lawyers are partners in the craft of generating law and justice."²⁹¹ He then moved to a discussion of the problems encountered by lawyers in their relationships with judges:

One of the important issues in lawyers' work is their relationships with the judge Lately, [a] number of meetings were held between Bar officials and judges in order to diminish and relieve the tensions in general, and particularly in judges—lawyers relationships, as part of the desire to create a fruitful and respectful work relations . . . not few cases were discovered in which the judges treated disrespectfully lawyers appearing before them without any justification.²⁹²

In a short essay published in *The Lawyer*, Eliezer Pney-Gil asks the judges not to forget where they came from: "Sometimes it seems that the judge, who was our former colleague, tends to forget this fact when he puts on the robe and sits on bench."²⁹³

There is no balance in the relationship between judges and lawyers, complained Yosi Shapira, the chairman of the Bar's District of Jerusalem.²⁹⁴ He defined those relationships as "fatal attraction" instead of

²⁸⁸ *Id.*

²⁸⁹ *Cf.* ABBOTT, *supra* note 8, at 67 (Abbott describes a similar structural relation to that which I portrayed as existing between nurses and doctors).

²⁹⁰ Alon Rom, *Judge-Lawyer, Lawyer-Judge Relationships*, THE ROBE, Dec. 1998, at 10.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ Eliezer Pney-Gil, *With All Due Respect—and Reciprocity*, THE LAWYER, Dec. 1997, at 7.

²⁹⁴ See Yosi Shapira, *Fatal Attraction or Reciprocal Relationships: Judge-Lawyer Relationships*, THE CHAMBER, Nov. 1998, at 27.

“reciprocal relationships” as they should have been.²⁹⁵ Lawyers, he argued, have duties to respect judges and assist the courts in their work, but judges have no parallel obligations toward lawyers. After analyzing the unbalanced relationships, he concluded his article by pleading for respect from the judges: “[W]hen we, the lawyers, come to the court, we expect to be treated as ‘partners in the system.’”²⁹⁶ He followed this with a list of demands, among them not to reprimand the lawyer in open court and not to address the client directly without the mediation of the lawyer.²⁹⁷ The list of demands ends with a declaration: “*We expect* that judges and lawyers would understand that we are all providers of services to the citizen, in other words we would expect ‘PROFESSIONAL COURTESY’ among all the parties to the legal process.”²⁹⁸

“We know that judging is a hard and exhausting job,” wrote Hoter-Ishai in an unusually conciliatory tone, “and we hope that judges still remember that lawyering is not an easy craft as well We hope that the attitude toward us will not be as to an interfering nuisance, but as a brother who is always willing to give advice and to offer his assistance.”²⁹⁹

In sum, two contrasting streams run through the lawyers’ reaction to the professional project. One is a militant stream that denounces the judiciary as a collapsing institution that produces injustice, and calls for revolutionizing the legal system. The other is a conciliatory stream that tries to bring the judiciary closer to the lawyers by using assimilation strategies and emphasizing the similarities between the Bar and the judiciary. These contrasting streams stem from the dialectical position the lawyers found themselves in following the professional project. Frustration and anger pushes them toward a militant stance but the inability to give up their relations with the judiciary impels them to adopt conciliatory methods.

IV. THE BEST OF BOTH WORLDS: THE ISRAELI JUDICIARY BETWEEN COMMON AND CIVIL LAW

At this point it might be useful to step back and situate this study within a comparative law context. A larger comparative context will add another dimension to our understanding of the professional project and might also help us comprehend the possible trajectories that are open to the Israeli judiciary.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 29.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 30.

²⁹⁹ Hoter-Ishai, *Non-Grudging*, *supra* note 267, at 8.

A. Common Law and Civil Law Traditions

Classical comparative law divides the Western world into two rudimentary legal traditions,³⁰⁰ the common law and the civil law.³⁰¹ The civil law tradition, also called the Romano-Germanic family, includes those countries in which legal science has developed on the basis of Roman *ius civile*.³⁰² Arguably the central characteristic of the civil law system is that law is codified:

In the civil law system, a code is an authoritative, comprehensive and systematic collection of general clauses and legal principles, divided into Books or Parts dealing in a logical fashion with the law relating thereto. Civil Law Codes are therefore regarded as the primary source of law, to which all other sources are subordinate, and often the only source of law on a particular matter.³⁰³

³⁰⁰ "Legal tradition" is defined as:

[A] set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.

JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 2 (1985) [hereinafter MERRYMAN, *THE CIVIL LAW*].

³⁰¹ According to some commentators, there is a third Western legal tradition—the socialist law. See, e.g., PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 31 (1995) ("It has become established practice to classify the legal systems of the worlds into three main types of legal families or legal traditions: civil law, common law and socialist law."); MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 14 (1985). But see John H. Merryman, *On the Convergence (and Divergence) of the Civil Law and the Common Law*, 17 *STAN. J. INT'L L.* 357, 358 (1981) [hereinafter Merryman, *Convergence (and Divergence)*] ("All of the national legal systems of the Western world are members of two great legal families: the Romantic Civil Law and the English Common Law."). For the purpose of this article the socialist law tradition is irrelevant. It should also be emphasized that "the traditional distinction between common law and civil law is considered a subdivision within a highly homogeneous family of legal systems: the western legal tradition or, more appropriately, the *rule of professional law*." Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 *AM. J. COMP. L.* 5, 23 (1997). See also Gino Gorla & Luigi Moccia, *A 'Revisiting' of the Comparison between 'Continental Law' and 'English Law' (16th-19th Century)*, 2 *J. LEGAL HIST.* 143 (1981).

³⁰² See RENE DAVID & JOHN E. C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 21 (1978). The countries that are currently classified under the civil law world are most of the Western European countries, the Latin American countries, the Near East countries, large parts of Africa, Indonesia, and Japan. See DE CRUZ, *supra* note 301, at 43.

³⁰³ DE CRUZ, *supra* note 301, at 46.

The common law tradition includes the law of England and those laws modeled on English law, such as those of the United States, India, and the Commonwealth countries.³⁰⁴

Common law countries are broadly those whose juristic style is based on the English common law model, predominantly founded on a system of case law or juridical precedent and for whom legislation has not been traditionally regarded as a primary source of law, but usually regarded as mere consolidations or clarifications of legal rules and principles which are essentially derived from case law and judge-made law.³⁰⁵

1. Legal Professions in the Common Law and the Civil Law

Legal professions "differ fundamentally across time and space."³⁰⁶ The evolution of legal professions is inseparably tied to the specific cultural and historical conditions in which they evolved, and thus it is not surprising that the legal profession in the civil law is dramatically different from its common law counterpart.³⁰⁷ In fact, some commentators go as far as arguing that the notion of the "legal profession" itself is suitable only for the common law world: "[T]he division of labor among professional lawyers in the civil law world," argues Merryman, "displays characteristics unfamiliar to the common law world, and particularly to those in the United States. Americans usually think of *the* legal profession, of a single entity. To Americans a lawyer, no matter what kind of legal work he happens to be doing at the moment, is still a lawyer."³⁰⁸ In the civil law world, however, the situation is very different. There is a sharp line dividing the different branches of the legal profession. "They develop their own expertise, their own career image, [and] their own professional association."³⁰⁹ Instead of one unified profession as in the common law, one finds in the civil law world several distinct professions among which there are "rivalries, jurisdictional problems and failure of communication."³¹⁰ Dietrich Rueschemeyer concurs with this conclusion

³⁰⁴ DAVID & BRIERLEY, *supra* note 302, at 23.

³⁰⁵ DE CRUZ, *supra* note 301, at 44.

³⁰⁶ Richard L. Abel, *Using the Theories: Comparing Legal Professions: Lawyers in the Civil Law World*, in *LAWYERS: A CRITICAL READER* 134 (Richard L. Abel ed., 1997) [hereinafter Abel, *Using the Theories*].

³⁰⁷ See Abel, *Lawyers in the Civil Law World*, *supra* note 6, at 4.

³⁰⁸ MERRYMAN, *THE CIVIL LAW*, *supra* note 300, at 101.

³⁰⁹ *Id.* at 102.

³¹⁰ *Id.*; see also DIETRICH RUESCHEMEYER, *LAWYERS AND THEIR SOCIETIES: A COMPARATIVE STUDY OF THE LEGAL PROFESSION IN GERMANY AND IN THE UNITED STATES* 30 (1973). The author stated that:

In both countries [the United States and Germany] it is customary to distinguish four major subgroups of lawyers: the judiciary, lawyers in private

in the German context. “[I]n Germany,” he wrote, “there are for all practical purposes several more or less distinct professions, bound together by a common education.”³¹¹

2. The Judiciary

Correspondingly, two dominant models of judiciaries can be identified in the Western world. In the common law world, judgeship is not an independent professional career path but the culmination of a successful legal career either in private practice or in the service of the government. The Anglo-American judge is appointed or elected based on a variety of factors, including success in practice, reputation among fellow lawyers, and political influence.³¹² Appointment to judicial office “comes as a kind of crowning achievement relatively late in life.”³¹³ The status of common law judges is very high. They are “culture heroes,”³¹⁴ or, as Dawson put it, “oracles of the law.”³¹⁵

The situation is very different for their counterparts in Continental Europe and Latin America. Judgeship in the civil law world is a separate career path.³¹⁶ It is one of several alternatives opened to a civil law graduate:³¹⁷ “The civil law graduate is faced upon graduation or shortly thereafter with a choice among the various branches of the profession, a

practice, lawyers in government service, and lawyers in private employment. In Germany these four groups are—in type of career, membership in professional associations, and self-image—much more distinct than in the United States; in fact, they are differentiated to such an extent that it is questionable to speak of one profession.

Id.

³¹¹ *Id.* at 31-32. See also Erhard Blankenburg & Ulrike Schultz, *German Advocates: A Highly Regulated Profession*, in *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD* 124 (Richard L. Abel & Philip S.C. Lewis eds., 1988) (arguing that the concept of a “legal profession” is misleading in the German context).

³¹² See MERRYMAN, *THE CIVIL LAW*, *supra* note 300, at 34. See also Lewis, *Introduction*, *supra* note 10, at 16. Lewis noted that:

In common law countries, as a rule, those entering the higher judiciary are appointed from the ranks of practicing advocates. Even in the United States, where prosecutors and occasionally academic lawyers are appointed to the higher judiciary and political considerations are relevant, lack of trial experience is legitimately urged as an argument against appointment. This enhances the prestige of advocates and, more significantly, links the profession with the judiciary.

Id.

³¹³ MERRYMAN, *THE CIVIL LAW*, *supra* note 300, at 34.

³¹⁴ *Id.*

³¹⁵ JOHN P. DAWSON, *THE ORACLES OF THE LAW* xi (1968).

³¹⁶ See Lewis, *Introduction*, *supra* note 10, at 16.

³¹⁷ MERRYMAN, *THE CIVIL LAW*, *supra* note 300, at 35.

choice which is likely to be final" and irrevocable.³¹⁸ Professional training for judges takes place largely within the judicial body, either in special schools for judges or as a sort of apprenticeship.³¹⁹ The young judges begin their career at the bottom of a pyramid-like institutional structure and lateral entry into the judiciary is very rare. Thus, "the great majority of judicial offices, even at the highest levels, are filled from within the ranks of the professional judiciary."³²⁰

Moreover, the cultural position of the civil law judge is different from its common law counterpart.³²¹ The civil law judge is a civil servant and is far from being a cultural hero. The important figures in the civil law world are legislators and legal scholars who write the codes. The process of judicial decision-making is perceived as a mechanical application of existing legal rules, set by legislators and legal scholars. The role of the judge, in the collective image, is reduced to finding the suitable legal rule, couple it with the factual situation and the judicial decision is automatically produced.³²²

³¹⁸ GLENDON ET AL., *supra* note 301, at 152. See also ABEL, AMERICAN LAWYERS, *supra* note 8, at 181 ("In most European legal professions, graduating law students make career choices that are fairly irrevocable.").

³¹⁹ See Carlo Guarnieri, *Justice and Politics: The Italian Case in a Comparative Perspective*, 4 IND. INT'L & COMP. L. REV. 241, 242 (1994) [hereinafter Guarnieri, *Justice and Politics*]. Examples include: France's L'Ecole Nationale de la Magistrature [The National School of Magistracy], see Anne Boijeol, *El Ascenso de los Juristas en Francia*, in LA CULTURA JURIDICA EN AMERICA LATINA Y LOS PAISES DE LA EUROPA MEDITERRANEA [The Ascent of the Jurists in France, THE JUDICIAL CULTURE IN LATIN AMERICA AND THE COUNTRIES OF MEDITERRANEAN EUROPE] (Lawrence M. Friedman & Rogelio Perez-Perdomo eds., forthcoming 2001); Spain's La Escuela Judicial [The Judicial School], see Reglamento Numero 2/1995, de 7 de Junio, De La Escuela Judicial, [Regulation Number 2/1995, June 7, of the Judicial School], at <http://www.cgpi.es/cgpi.html> (last visited May 13, 2000); and Chile's Academia Judicial, [Judicial Academy] see Leyes Relativas a la Reforma Judicial, Ley No. 19.346 Crea la Academia Judicial (Publicada en el Diario Oficial el 18/11/94) [Laws Relative to the Judicial Reform, Law Number 19346 Creates the Judicial Academy (published in the official newspaper of Nov. 18, 1994)], at <http://www.congreso.cl/biblioteca/biblioteca.html> (last visited Mar. 27, 2001).

³²⁰ MERRYMAN, THE CIVIL LAW, *supra* note 300, at 35.

³²¹ See, e.g., Carl Baudenbacher, *Some Remarks on the Method of Civil Law*, 34 TEX. INT'L L.J. 333, 355 (1999) ("The greatest differences between the civil law and the common law systems concern the status of the judges. Judges in most civil law countries are highly respected magistrates, but they do not have public status comparable to that of their common law counterparts.").

³²² See JOHN H. MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA AND EAST ASIA 975-1011 (1994) (describing the practice of legal interpretation in civil law countries). The stark difference between the common law and the civil law judges in the collective image is captured by Lyotard's comparison of American and French judges. See Mitchel de S.-O.-I'E Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1326 (1995) ("The American judge is somehow expected to judge, really to judge. In France, the Code is supposed to have already judged." (quoting Jean-Francois Lyotard, council member at the College International de

B. The Effects of Globalization

Both the common law and the civil law are only ideal types. In reality, legal systems are inherently hybrid and are becoming increasingly more so with the progression of globalization.³²³ Comparative law literature deals extensively with what many scholars identify as global convergence tendencies. Convergence is not a very recent phenomenon. As early as 1981, John Merryman raised the question of whether the civil law and the common law are becoming more alike (converging) or less so (diverging). As an answer he suggested that "there are significant tendencies in both directions but that convergence . . . is the more powerful one."³²⁴ Since the early 1980s, convergence tendencies have only increased. Lawrence Friedman argued in 1994 that one of the characteristics of what he called the "modern legal culture" is globalization: "As the world gets smaller, knit together by the miracles of transportation and communication, the practice of law and, I believe, legal culture, are rapidly internationalizing . . . this is an age of *convergence* in legal cultures. That is, legal systems become more similar as time goes on."³²⁵ Studies of particular legal systems support this argument. Convergence is felt in various legal doctrines and institutions in different Western countries. Thus, for instance, one study demonstrated that the reliance on precedents, which is considered one of the classic differences between common law and civil law jurisdictions, is diminishing, whereas in many civil law countries such as Germany, France, and Spain, there is an increasing tendency to rely on precedents either explicitly or implicitly.³²⁶

Convergence tendencies have also influenced the legal professions³²⁷ and particularly the judiciaries in both civil law and common law countries. In Germany, for instance, the Constitutional Court that was established after World War II with the authority to nullify legislation changed drastically the whole notion of the judiciary and brought it closer to the

Philosophie, New Haven, Connecticut)).

³²³ See Lawrence M. Friedman, *Is There a Modern Legal Culture?*, 7 *RATIO JURIS* 117 (1994) [hereinafter Friedman, *Modern Legal Culture*].

³²⁴ Merryman, *Convergence (and Divergence)*, *supra* note 301, at 359.

³²⁵ Friedman, *Modern Legal Culture*, *supra* note 323, at 125. See also Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 *STAN. J. INT'L. L.* 65 (1996).

³²⁶ See Thomas Lundmark, *Interpreting Precedents: A Comparative Study*, 46 *AM. J. COMP. L.* 211, 215 (1998) (reviewing *INTERPRETING PRECEDENTS: A COMPARATIVE STUDY* (D. Neil McCormick & Robert S. Summers eds., 1997)).

³²⁷ Abel, *Revisioning Lawyers*, *supra* note 93, at 4 ("[T]here is evidence that common and civil law professions are converging as a concomitant of the globalization of the economy. Many of the divisions within civil law professions are disappearing.").

Anglo-American model.³²⁸ Similarly, in Italy, as a reaction to past abuses, occurring during both the liberal and the fascist regimes, the constitutional design in the administration of justice realm was altered, a transformation that led to an increase in both the internal and external independence of the Italian judges. As a result of this process, a peculiar judicial setting has emerged in Italy "that combines in an original way features typical of Continental systems with elements found in Anglo-Saxon judiciaries."³²⁹ Despite these convergence tendencies, however, many commentators believe that the civil law world is still substantially different from its common law counterpart.³³⁰

C. *The Israeli Judiciary: Between Common and Civil Law*

The Israeli legal system is frequently identified as part of the common law world.³³¹ Growing out of the colonial British legal system, Israel preserved many characteristics of its justice administration, among them the structure of the judiciary. Given Israel's legal history, the professional project might appear as a transition from a common law type of judiciary to a civil law model of professional judgeship. In some respects, primarily organizational and structural ones, this is indeed so. Similar to the civil law judges, Israeli judges are increasingly recruited without significant professional experience and "are placed at the bottom of the pyramid-like structure where their careers are constantly monitored by an organizational

³²⁸ Nonetheless it should be noted that there is a clear distinction between the German Constitutional Court and the regular court system. While the Constitutional Court has certain influence on the image of the judiciary as a whole, the German judiciary is still much closer to the ideal type of the civil law judiciary, depicted above, than to that of the common law judiciary. See DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 3-4 (1989).

³²⁹ Guarneri, *Justice and Politics*, *supra* note 319, at 249.

³³⁰ See, e.g., Abel, *Using the Theories*, *supra* note 306, at 39-40. Abel stated that: As far as legal families are concerned, [] it is still relevant, useful and accurate to examine common law and civil law systems according to the criteria we have been discussing [A]lthough convergence of some description is certainly foreseeable, deep-seated differences in ideology, political attitude, social and economic policies, not to mention fundamental values and philosophies, attitudes to law, and judicial, executive and administrative structure would first have to be reconciled with each other. Wholesale integration is certainly not a likely prospect in the foreseeable future but a preliminary attempt at harmonisation [sic] of elements of different systems has already begun in the context of the European Union.

Id.

³³¹ See, e.g., KONRAD ZWEIGERT & HEIN KOTZ, *INTRODUCTION TO COMPARATIVE LAW* 244-45 (T. Weir trans., 2d ed. 1987); Aaron Kirschenbaum, *Modern Times, Ancient Laws—Can the Torah be Amended? Equity as a Legal Source of Legal Development*, 39 ST. LOUIS U. L.J. 1219, 1219 n.1 (1995) ("The State of Israel is a common law jurisdiction, differing from English law as American or Canadian law differ from each other.").

hierarchy.”³³² As a consequence, judgeship takes the shape of a separate career path and lateral entry into the judiciary is becoming increasingly unusual. Likewise, there are attempts to imitate the civil law training system in which candidates for judicial offices receive additional education within the institutional boundaries of the judiciary. One side effect of this process is that the organizational setup conditions the judge’s reference group and it is increasingly “inside the organization that judges tend to be socialized professionally.”³³³

However, in other respects, not only does the Israeli judiciary not attempt to imitate the civil law, but on the contrary it invests immense efforts to ensure its distinctiveness from this model. There is nothing more foreign to the Israeli judges than the colorless civil-servant-judge that characterizes the civil law system. The Israeli judges have not ceased perceiving themselves as statesmen and policy makers in the American style. “The judge’s status in Israel,” argues the Chief Justice, “is different from that in the Romano-German family.”³³⁴ “Israel’s law contains . . . the special status of the judiciary of the common law countries.”³³⁵

Any attempt to attach to the judges a status of civil servants or to bind them together with civil service encounters harsh opposition.³³⁶ The bureaucratic judiciary of the civil law model with its close relation to the state is rejected as “inconsistent with judicial independence.”³³⁷ In contrast to the civil law model, which maintains a close relationship between the judiciary and the state, the Israeli judiciary has recently launched a campaign that calls for the administrative separation of the judiciary from the State apparatus and the establishment of the judiciary as an independent authority.³³⁸

The conclusion is that a new model of judiciary is evolving in Israel. The Israeli judiciary attempts to dissociate itself from the legal profession and construct a separate judicial profession imitating the structure of the judiciary in civil law countries, while at the same time retaining the status of statesmen and the independent position that characterizes the Anglo-

³³² Guarnieri, *Justice and Politics*, *supra* note 319, at 243.

³³³ *Id.*

³³⁴ Aharon Barak, *The Tradition and Culture of the Israeli Legal System*, in *EUROPEAN LEGAL TRADITIONS AND ISRAEL* 473, 482 (Alfredo M. Rabello ed., 1994).

³³⁵ *Id.* at 476.

³³⁶ This is manifested in the *Landau Commission Report*: “Judges are not ‘civil servants.’ They are not employed on employer–employee basis. Judges have special status . . .” *Landau Commission Report*, *supra* note 142, at 3.

³³⁷ SHETREET, *supra* note 4, at 159.

³³⁸ See REPORT OF THE COMMISSION FOR THE EXAMINATION OF A CONSTITUTION OF AN INDEPENDENT JUDICIAL AUTHORITY (1996).

American judges.³³⁹ This process might be perceived as a part of the global convergence tendencies in both common law and civil law countries, but the specific form it took can be understood only on the background of the historical forces that shaped it. The diminishing shared interest and the ideological rift between the Bar and the judiciary elicited the evolving self-awareness of the judiciary to their professional distinctiveness and evoked institutional and social closure. The same process, however, which was triggered by the increased status and moral power of the judiciary, also pushed the court toward a more aggressive involvement in Israel's public and political spheres. Hence, their unique claim to professionalism is based not only on formal analytical expertise and a proficiency in the grammar of the legal system, but also on an "explicit promise to a 'better and more just' management and control."³⁴⁰

CONCLUSION

This article offers a new understanding of the transformations in the Israeli legal field in the last two decades. It ties together seemingly unrelated phenomena that have arisen in the Israeli legal field in the 1980s and the 1990s, such as promulgation of ethical rules, shifts in judicial career patterns, and the rift between the Bar and the bench, and explains them as emerging from one common origin—the professional project of the judiciary. This article also demonstrates that a new model of the judiciary is evolving in Israel that collapses the traditional distinction between common and civil law judiciaries, constructing a novel hybrid combining the best of all worlds.

It is too early to assess whether the professional project has won a victory or suffered a defeat. The current situation, however, is not favorable to the judiciary. The Israeli judiciary, and primarily the Supreme

³³⁹ The Chief Justice acknowledges this mixing of common law and civil law features: What characterizes us as a legal system? . . . We are not part of the common law; we are not part of the civil law. Who are we then? Indeed, we are exceptional. Mixed jurisdiction. We are a system with its own style within the boundaries of the Western legal culture. This is our distinctiveness, and this is our contribution to the Western legal culture.

Lecture by the Chief Justice, Professor Aharon Barak, THE ROBE, Apr. 1998, at 7. *See also* Shlomo Levin, *The State of the Courts in Israel*, 45 *FED. LAW.* 33, 33 (1998). Levin stated that:

For the first time in many years, Israel has been officially recognized as a Common Law Court system country. It was no doubt partially true at the time I studied at the Hebrew University of Jerusalem; but things were changed, and even at the time, it was not entirely true. As a matter of fact, the Israeli system of law can be described as a mixed system of law.

Id.

³⁴⁰ Ronen Shamir, *The Politics of Reasonableness*, *supra* note 98, at 11.

Court, stand in recent years at the center of the turbulent Israeli social and political situation. Israeli society underwent rapid changes during the 1990s and power relations shifted dramatically. Groups that were, until recently, marginalized and silenced managed to acquire political power and accused the judiciary of being partisan, representing interests and values of specific segments of society. In February 1999, for instance, the ultra-orthodox community organized a huge demonstration of a quarter of a million persons against the Supreme Court, calling it to put an end to its involvement in issues of state and religion.³⁴¹ Middle Eastern Jews (Mizrahim) blame the judicial system for cooperating with the Western (Ashkenazi) establishment in subordinating them.³⁴² Palestinian as well as leftist Jewish scholars accuse the Supreme Court of legitimizing Israel's colonial practices.³⁴³ All the above, in addition to the severe assaults of the Bar, managed to cause cracks in the legitimacy shield of the Court.³⁴⁴

It is hard to predict where all this will lead. Professional projects are usually designed to immunize the group of professionals from outside intervention or criticism. However, as this article has suggested, the professional project launched by the Israeli judiciary rests not on formalism but on values,³⁴⁵ and as such, despite the heroic attempts of the courts to present judicial practice as "scientific," it is exposed to the danger of a transition of social values and the entailed loss of legitimacy.³⁴⁶ A return to

³⁴¹ See Shahar Ilan et al., *Around Quarter of a Million People Participated in a Demonstration-Prayer Against the Supreme Court in Jerusalem*, HA'ARETZ, Feb. 19, 1999, at A3.

³⁴² See Shahar Ilan, *Deri: The Judicial System Intervened in the Elections in order to Stop Shas*, HA'ARETZ, Apr. 16, 1999, at A5 (the leader of Shas Party—the Mizrahi political party—accused the judiciary of intervening in the election in order to diminish their political power).

³⁴³ See RAJA SHEHADEH, *OCCUPIER'S LAW* (1985). See also Ronen Shamir, "Landmark Cases" and *the Production of Legitimacy: The Case of Israel's High Court of Justice*, 24 LAW AND SOC'Y REV. 781 (1990).

³⁴⁴ The difficult situation the Court found itself in is expressed in a letter sent by the Chief Justice to all the judges in March 1999: "My Dear Brothers and Sisters, The passing year was not easy—neither to judges as individuals nor to the Judiciary as an institution." Letter from the Honorable Aharon Barak, Chief Justice of the Supreme Court, to all the Judges of the Israeli Judiciary (Mar. 31, 1999) (on file with author). It is also apparent from the recent appointment by the Chief Justice of a special commission to examine ways of improving the public image of the judiciary and strengthening the dialogue between judges and the media. See Zeri Hazan, *The Judges Assailing the Media*, TEL-AVIV, Apr. 2, 1999, at 24.

³⁴⁵ Ronen Shamir argues that the value-based professionalism of the judiciary is in fact a radical formalism. Such radical formalism is characterized by the belief that it is possible to develop a "legal language" that stands in a "provable" contrast to the ideological and political controversies that take place within society. Shamir, *The Politics of Reasonableness*, *supra* note 98, at 8 (1994).

³⁴⁶ Cf. LARSON, *supra* note 8, at 169:

[T]he cognitive basis of the legal profession articulates 'transcendent' values

formalism is not likely. What seems most plausible, then, is that the early twenty-first century will continue to witness a value-driven Israeli judiciary, struggling for its legitimacy in an increasingly divided Israeli society.

which are, in fact, backed by the force of the state. But despite its connection with a 'transcendent' zone of dominant ideology, this cognitive basis cannot appear to be as immune to class interests as, for instance, the scientific basis of medicine or engineering.

Id.